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# GRAHAM & LANE'S

# EXCISE LAWS

OF THE

# STATE OF NEW YORK,

INCLUDING THE

## RIGHTS, DUTIES AND LIABILITIES

OF

## HOTEL KEEPERS.

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BY

C. H. GRAHAM and O. F. LANE,

COUNSELORS AT LAW.

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ALBANY, N. Y.:
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# PREFACE.

*To the Public:*

In submitting this work upon the excise and hotel laws, and the duties and liabilities of hotel keepers, it is done with a full knowledge of the difficulties to be overcome.

From a long practice and a thorough examination of these laws as scattered through our statutes, as well as by an examination of an occasional work covering some portion of the ground by some author who discovered its necessity, we have become satisfied that there is a chance for much improvement; but that our work is perfect we do not pretend. Difficulties are many, in the way of a thorough elucidation, and if we have, in the main, succeeded, we shall be satisfied.

The practitioner and temperance reformer meet many difficulties in their efforts to enforce the excise laws. These we have attempted to surmount. We cannot, however, make it easy or reputable to engage in the business of an informer, neither can we restrain the liquor seller from denying his guilt, or induce the excessive drinker to abstain from his cups and prosecute the men who have robbed him and his family of their sustenance.

Our labor is not for the special purpose of reformation, but simply to collect and arrange the law as we find it filled with many imperfections and sometimes contradictions and endeavor to present, as far as possible, the law of to-day, and the various decisions thereon by the courts that help to elucidate and explain the conflicting and ambiguous statutes. If, under the various sections of the several statutes, we have made too many explanations, it is because the work is intended to meet the eye of those not learned in the law,

as well as to assist those of our profession who have not the time to examine all the questions to be found herein, and who prefer to take some things for granted, and feel that in so doing they are relying upon some one who has given the subject thorough examination, and that the result of such examination is before them.

Errors there are no doubt, but they have been avoided as carefully as possible, and our work is submitted with the conviction that it is not wholly in vain.

To every lawyer it is a necessity, to innkeepers it is important, as it gives them the opportunity, easily, to know the law and their liabilities thereunder, and to excise commissioners, overseers of the poor and temperance reformers it is important, that they may know their duties and the labor that lies before them.

THE AUTHORS.

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# INTRODUCTION.

On the passage of the Revised Statutes in 1827 and 1828, the legislature re-enacted and adopted an excise law, most of which had in one form or another been in existence from the establishment of the State government.

By the Revised Statutes, the supervisor and two justices of the peace were excise commissioners: they were authorized to grant hotel and grocers' licenses; the fee was from five to thirty dollars; good moral character, sufficient ability and ample accommodations were required. The bond was for $125, that the person licensed would not suffer his house to become disorderly, nor allow cock-fighting, playing with cards or dice, nor keep a gaming table of any description. For a failure to keep the necessary requirements of a hotel, he forfeited five dollars, to be recovered by the overseer of the poor. Then, as now, he was to keep up a sign under a penalty, and no person who did not have a hotel license should put up a hotel sign.

No persons but lodgers or travelers were to be trusted more than $1.25, and securities for such debts were void. Grocery keepers were to give bonds that they would live up to the law requirements. A fine of twenty-five dollars for selling by measure without a license, and to minors, servants, etc. The penalties for offenses were to be recovered by the overseer of the poor, unless otherwise provided. Breaches of bonds were to be prosecuted as now; records of convictions were to be sent to the court of sessions, and they to revoke a license. All offenses against the act were made misdemeanors.

Methiglen, currant wine, cherry wine and cider were exempted from the operation of the law. The amendments

were slight until 1845, when the several towns of the State were given the privilege of determining by ballot whether license should be granted or not in the several towns. It was slightly amended in 1846. In 1854, the law which is now in existence was passed in substance. The right was given to any person to prosecute for the penalty if the proper parties did not do so, but the prosecutor was compelled to give security for costs. In 1857 the former statutes were repealed, and chapter 628 of that year enacted in their place. This act created the county commissioners of excise, which existed until 1874. This excise law has been amended by adding to, or taking from, until it has become what it now is, as fully compiled in Chapter I. In subsequent chapters the decisions of the courts of this State upon every question of importance are fully and carefully examined, discussed and cited, to which is added a chapter on the duties and liabilities of hotel keepers to their guests and the public at large, together with the special statutes enacted for their benefit.

# CHAPTER I.

## STATUTES.

SECTION 1. At the annual town meetings in the several towns in this State, held next after the passage of this act, there shall be elected, in the same manner as other town officers are elected, three commissioners of excise, who, while acting as such commissioners, shall not hold either of the offices of supervisor, justice of the peace, or town clerk, the office of president or trustee of any incorporated village, and who shall compose the board of excise of their respective towns, and discharge the duties imposed upon the supervisor and justices of the peace of towns, and the president and trustees of incorporated villages thereof, by chapter 175 of the Laws of 1870, and laws amendatory thereof and supplementary thereto; and shall be entitled to receive compensation at the rate of three dollars per day, while in session, as a board of excise, which shall be a town charge; except in the counties where the moneys received by said board are paid into the county treasury as hereinafter provided, when it shall be a county charge. The commissioners first elected under this act shall be classified by lot, under the superintendence of the supervisor, the justice of the peace having the shortest time to serve, and the town clerk, or a majority of such officers, who shall meet at the office of the town clerk of their respective towns, for such purpose, within ten days after such town meeting, and the per-

NOTE.—The numbers given at the bottom of some of the sections allude to the sections of the Excise Law contained in Volume 1 of the Revised Statutes, published in 1829, covering substantially the same grounds as the sections numbered. Every offense under those statutes was made a misdemeanor by section 25. See section 3, chapter 3.

sons drawing for one, two and three years shall serve for such terms respectively; and annually thereafter one commissioner of excise shall be elected for a term of three years. Vacancies occurring in said boards, from any cause, shall be filled by appointment by the supervisor and justices of the peace of said town, or a majority of them, until the next annual town meeting, when such vacancy shall be filled by election. (Section 1, chapter 444, Laws of 1874.)

*1.

§ 2. The said commissioners shall be voted for upon a separate ballot, which shall be deposited in a separate box, marked "excise," and before entering upon the duties of their offices shall take and subscribe the constitutional oath of office and file the same with the town clerk, and shall execute a bond to the supervisor thereof, to be approved by him in double the amount of the excise moneys of the preceding year, conditioned for paying over to him or his immediate successor in office, within thirty days after the receipt thereof, all moneys received by them as such excise commissioners. Said moneys shall be disposed of as directed by the town board, except in those counties where the support of the poor is a county charge where such excise money shall be paid into the county treasury, subject to the control of the board of supervisors. (Section 2, chapter 444, 1874.)

§ 3. Nothing in this act shall affect the provisions of any special act in so far as the same provides for any special disposition of excise moneys or fines. (Section 3, chapter 444, 1874.)

§ 4. The mayor of each of the cities, except in the cities of New York, Brooklyn and Poughkeepsie, shall appoint the commissioners of excise in their respective cities within ten days after the passage of this act; but in the cities of New York, Brooklyn and Poughkeepsie, the mayor shall nominate three good and responsible citizens to the board of aldermen of such cities respectively, who shall confirm or reject such nominations. In case of the rejection of such nominees, or any of them, the mayor shall nominate other persons as aforesaid, and shall continue so to nominate, until the nominations shall be confirmed. The present commissioners of excise for the metropolitan district and the

commissioners for the counties shall continue to exercise the duties of the office until such appointments, or some one of them, shall be appointed in such cities respectively, as herein provided. Any one or more of the commissioners so appointed shall have the power to act as a board of excise for the city in which he shall be appointed, until the others shall be duly appointed. Commissioners of excise in cities shall hold their offices for three years, and until others shall be appointed in their places, and shall receive a salary not to exceed $2,500 a year each, to be fixed by the mayor and common council of their respective cities, and shall be paid as other city officers are paid. (Section 2 of chapter 175, 1870, as amended by chapter 145, 1879.) Provided, that in the city of New York the commissioners of excise shall receive a salary not to exceed $5,000 a year each, to be fixed by the board of estimate and apportionment of said city, who shall annually fix such amount as may be necessary for hire of employees, rent and other necessary expenses of said board of commissioners, which amount shall be paid out of the moneys received for licenses, and said commissioners shall receive no other compensation or emolument for services as commissioners; and provided further, that all excise moneys hereafter derived from licenses for the sale of intoxicating liquors by said commissioners, except as above provided, shall, from time to time and in sums according to their discretion, be appropriated by the board of apportionment and estimate of said city by resolution of the said board to whatever benevolent, charitable or humane institutions may seem to such board deserving or proper; but no such resolutions shall be valid unless adopted by the vote of a majority of the said board; and the comptroller of said city is hereby authorized and directed to draw his warrants in favor of the corporations, societies or charitable institutions respectively mentioned in such resolutions according to the tenor thereof; and the chamberlain of said city shall pay such warrants out of the said moneys received for licenses, which are hereby directed to be deposited with and paid over to him within thirty days after it is received. (Chapter 549, 1873, as amended by chapter 642, 1874.) On the first Monday of April in every third year hereafter, the

mayor and board of aldermen shall proceed to appoint, in the manner above described, persons qualified as aforesaid, to be such commissioners of excise in their respective cities for the next three years, commencing on the first day of May in that year, and shall, from time to time, as often as vacancies shall occur, appoint persons qualified as aforesaid to fill the unexpired term of any commissioners who shall die, resign, remove from the city, or be removed from office. Such commissioners of excise in cities shall be removed for any neglect or malfeasance in office, in the same manner as provided by law for the removal of sheriffs. (Section 2, chapter 175, 1870, as amended by chapter 145, 1879, and by chapter 549, 1873, as amended by chapter 642, 1874.)

The foregoing section 4 is a compilation of several acts and their amendments, which, without their union as above, would not be clearly understood.

Section 2 of chapter 175, 1870, was amended in 1873 by chapter 549, and again in 1874 by chapter 642, but in a confused way by amendment of amendments. The legislature, April 4, 1879, probably overlooking the amendments of 1873 and 1874, went back to the original act of 1870 and amended it without regard to the former amendments; subsequently discovering the error, it enacted, June 4, 1879, a declaratory act, which we append as section 5, which has relation solely to the above-mentioned acts and their amendments. The amendments of 1873 and 1874 introduced a provision having reference solely to the city of New York, commencing with the word "provided" and ending with the words "within thirty days after it is received," while the amendment of 1879 merely added "Poughkeepsie" to the list of excepted cities.

### Declaratory Act.

§ 5. Nothing contained in chapter 145 of the Laws of 1879, entitled "An act to further amend chapter 175 of the Laws of 1870, entitled 'An act regulating the sale of intoxicating liquors,'" shall be construed to affect the provisions of chapter 642 of the Laws of 1874, entitled "An act declaratory of and to amend chapter 549 of the Laws of 1873, entitled 'An act to amend an act entitled 'An act regulating the

sale of intoxicating liquors,' passed April 11, 1870,' and the act entitled 'An act to suppress intemperance and to regulate the sale of intoxicating liquors,' passed April 16, 1857.'" Passed June 23, 1874. (Chapter 472, 1879.)

By chapter 377 of the Laws of 1880, entitled "An act in relation to the government of the city of Brooklyn," the method of appointing excise commissioners, or, "commissioners of excise," as they are there called, also the commissioners of police and excise, is pointed out. (See section 80, *post.*)

§ 6. The boards of commissioners of excise in the cities of this State, having a population of over 300,000 inhabitants, shall, if all other requirements of the law have been complied with, have power to grant license to sell strong or spirituous liquors, ale, wine or beer, to be drank on the premises, to be named in the application for such license, to any person or persons having a good moral character, whether or not they propose to keep an inn, tavern or hotel, provided that no such license shall be granted unless the said commissioners shall be satisfied, upon examination, that the applicant therefor is a person of good moral character, and that a license may properly be granted for such sale in the place proposed. (Section 1, chapter 340, 1883.)

§ 7. Any such board shall have, at all times, discretionary power to permit any person or persons, to whom a license may have been granted in respect of any specified premises, to remove to any other place within jurisdiction of the same board during the period covered by such license, and there to continue the conduct of business under such license, in the same manner as if no removal had been made; provided always, that such discretionary power shall not be exercised until and unless all the requirements of law to be observed upon the granting of an original license shall, upon said application for removal, be complied with and fulfilled in every respect. (Section 2, chapter 340, 1883.)

§ 8. No person or persons having a license under this act, nor any assistant, agent, employee or servant of any such person or person so licensed, shall be arrested for any alleged violation of any provision of any excise law by any peace officer or other person, unless a warrant therefor,

based on affidavit, shall have first duly issued according to law, except and provided that in case of any violation of any provision of any excise law between the hour of one o'clock Sunday morning and the hour of twelve o'clock Sunday night, in presence of any officer or person authorized to make arrests for violation of law, such officer or person may forthwith, and without warrant, make arrest of the person or persons so violating any provision of any excise law. Any officer or person authorized to make arrests for violation of law may arrest, without warrant, any person who, in the presence of such officer or other person authorized to make arrests, may be engaged in the sale of any intoxicating liquor without a license. (Section 3, chapter 340, 1883.)

§ 9. No city of this State having a population of more than 300,000 inhabitants, shall hereafter be subject to, or be embraced within, any provision of the sixth section of the act, chapter 628 of the laws of 1857, entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857. (Section 4, chapter 340, 1883.

§ 10. Any person who shall, without a license, sell or give away any strong or spirituous liquors, ale, wine or beer, to be drank upon the premises, shall be guilty of a misdemeanor; and nothing in this act contained shall alter or affect the provisions of existing laws, touching the sale or giving away of intoxicating liquors to be drank upon the premises, or the prohibition thereof in the cases mentioned in said laws, and the penalties prescribed therefor, except as provided in section four of this act, and such provisions of existing laws as are applicable to persons who might thereby be licensed to sell intoxicating liquors to be drank upon the premises shall be applicable to persons who may be licensed under this act, except as such laws are modified by the terms of this act. (Section 5, chapter 340, 1883.)

The last five sections constitute chapter 340 of the laws of 1883, and are applicable only to the cities of New York and Brooklyn, as no city beside them in this State has, or is likely to have, more than 300,000 inhabitants for some years to come.

The enacting clause of said act reads as follows: "An act to regulate the sale of intoxicating liquors in cities having a population of over 300,000 inhabitants," passed April 30, 1883.

§ 11. The commissioners of excise shall meet in their respective cities, villages and towns, on the first Monday of May in each year, for the purpose of granting licenses as provided by law, and at no other time for that purpose, except upon application for license made in good faith, in any town or village, and in such case not oftener than once in each month. In cities they shall meet on the first Monday of each month, and as often as they shall deem necessary. All licenses hereafter granted shall expire on the first Monday of May succeeding the date of such granting, except in the cities of New York, Brooklyn and Rochester, and all applicants where such license is granted for a period of less than one year, shall pay a pro rata amount of the license fee established for their place of business by the commissioners of their respective cities, towns and villages; and in said cities of New York, Brooklyn and Rochester, all such licenses shall expire at the end of one year from the time they shall be granted. (Section 3, of chapter 175, 1870, as amended by chapters 164 and 466 of the Laws of 1881, and by chapter 126 of the laws of 1882.)

The law of 1870—as it stood until 1881—left a time when there might be no license in force. It provided that licenses should be for one year from the first Monday of May. There is, however, more than one year, at times, from the first Monday of May to the first Monday of May in the succeeding year. Chapter 164 of the Laws of 1881, rectified this defect by omitting to limit the license to one year; but by chapter 466 of the same year, the length of a license was again limited to one year in the cities of New York and Brooklyn; and by chapter 126 of the Laws of 1882, the legislature added Rochester to New York and Brooklyn. It would be interesting to know why this is so. It took four chapters to fix a time for the meeting of the board and the duration of license, and it seems there should be one more amendment so there will not be a time of no license, or the hotel and saloon keepers of said cities will be com-

pelled to take out a six-day license to avoid being law breakers, where one year will not extend from the first Monday of May in one year to the first Monday of May in the succeeding year, and thus necessitate another meeting of the board for that purpose. Section four of the act of 1857, contemplating this, kept the license in force for ten days in all parts of the State, except New York city, and there for fifty days.

§ 12. The board of excise in any city, town or village shall have the power to grant license to any person or persons of good moral character, who shall be approved by them, permitting him or them to sell and dispose of, at any one named place within such city, town or village, strong or spirituous liquors, wines, ale and beer in quantities less than five gallons at a time upon receiving a license fee, to be fixed in their discretion, and which shall not be less than thirty dollars, nor more than $150, in any town or village, and not less than thirty dollars, nor more than $250, in any city. Such licenses shall only be granted on written application to the said board, signed by the applicant or applicants, specifying the place for which license is asked, and the name or names of the applicant or applicants, and of every person interested or to be interested in the business to authorize which the license shall be used; and the license shall be kept posted, by the person or persons licensed, in a conspicuous position in the room or place where his or their sales are made, and shall be exhibited at all times by the person or persons so licensed, and by all persons acting under such license, on demand, to every sheriff, constable or officer, or member of police. Any omission so to display and exhibit such certificate shall be presumptive evidence that any person or persons so omitting to display and exhibit the same has and have no license. The said board of excise shall keep a complete record of the names of all persons licensed, as herein provided, with a statement of the place licensed, and license fee imposed and paid in each case, which record they shall at all times permit to be seen in a convenient place at their principal office in any city, or at the clerk's office in any town or village. Persons not licensed may keep, and, in quantities not less than five gal-

lons at a time, sell and dispose of strong and spirituous liquors, wines, ale and beer, provided that no part thereof shall be drunk or used in the building, garden or inclosure communicating with, or in any public street or place contiguous to, the building in which the same be so kept, disposed of, or sold. (Section 4. chapter 175 of the Laws of 1870, as amended by section 2, chapter 549, 1873.)

At the same session of the legislature that the above section was amended (1873) an act was passed (chapter 249) making the trustees of villages the commissioners of excise in such villages; therefore the above section alludes to village boards.

Chapter 249, 1873, was superceded, as we view it, by the adoption of section 1, chapter 444, of the Laws of 1874. (See section 1, *ante*, page 1.)

The following four sections, which are sections 2, 3, 4 and 5, of chapter 628 of the Laws of 1857, are inserted because it is probable that some minor portions of each are not entirely superceded by the laws of 1870 and 1873. The part of section 2 of that act that seems not to be "inconsistent or in conflict" with any other law passed subsequently, that is from the first period (.) to and including the word "garden." The first part of the section is disposed of by being in conflict with chapter 126 of the Laws of 1882 (*ante*, section 11), while the latter part of the section is superceded by section 2, chapter 549, 1873 (*ante*, section 12):

Section 3 of said act of 1857, seems so far to be in force as to require the commissioners to "keep a book of minutes of all their proceedings, and every resolution passed by them, to be verified by their signatures," while the balance of the section would probably be held to be "inconsistent with" section 4 of chapter 175, 1870, as amended by section 2, chapter 549, 1873. (*Ante*, section 12.)

Section 4 of said act is also probably in force, so far that the licenses shall be signed by the commissioners, and that no license shall be issued until all preliminaries are complied with, while the balance is also disposed of by the act of 1882.

Section 5 of said act, down to the first period (.), is repealed by a contrary statute, which declares that the commissioners shall not keep a clerk. (See chapter 175, 1870;

*post* section 48.) While the next sentence directs minutes to be kept, in which all names of applicants, a list of licenses granted, and the names of the sureties on the bonds, shall be given. This will necessitate making a secretary of one of the board.

Sections 3 and 5 seem to be so far "inconsistent" with each other as to cause the commissioners to keep two books of minutes, one to be filed with the town clerk, and the other with the county clerk. These sections, however, were in relation to the action of commissioners of excise of counties, who have been displaced by commissioners of towns, and it is a matter of some doubt as to how much, and what portion, of said five sections are still applicable under the statute as it now stands.

Section 6 of the act of 1857, directs the commissioners to be satisfied of the good moral character of the applicant, while section 2 of chapter 549, 1873, as amended, does not give them in terms that discretion; but as the two sections do not seem to be entirely inconsistent with each other, we assume, in the absence of any decision upon the subject, that the two clauses should be construed together. There are several parellel propositions in these and other sections, with subsequent amendments, and it is the safest way for the practitioner or commissioners to assume them to be each in force and thus keep within the *letter* of the law until the courts shall decide upon the *spirit*, as they have in some particulars, as will appear hereafter.

§ 13. The commissioners of excise shall meet in their respective counties at the place aforesaid, on the third Tuesday of May in each year, and on such other days as a majority of the commissioners shall appoint, not exceeding ten days in any one year, and, in the city of New York, not exceeding fifty days, for the purpose of granting licenses as hereinafter prescribed. They shall have power to grant licenses to keepers of inns, taverns or hotels, being residents of the town or city where such inn, tavern or hotel is proposed to be kept, to sell strong and spirituous liquors and wines to be drank in their houses respectively; and to store keepers being such residents, a license to sell such liquors and wines in quantities less than five gallons, but not

to be drank in their shops, houses, out-houses, yards or gardens, and they shall have power to determine the sum to be paid for a license by each person applying, which sum shall be as follows: In towns and incorporated villages not less than thirty dollars nor more than $100, and in cities not less than thirty dollars nor more than $250. No license shall be granted to any person or firm to sell in more than one place. (Section 2, chapter 628, 1857.)

* 2, 4.

Time of meeting changed by section 11.

§ 14. They shall keep a book of minutes of all their proceedings in which shall be entered every resolution passed by them granting a license to any person, with the sum required to be paid, which minutes shall be verified by their signatures and filed with the town clerk of the town for which such license shall be granted, and in the several cities of the State, with the city clerk, within eight days thereafter. (Section 3, id.)

* 3.

§ 15. All licenses shall be signed by the commissioners granting the same. They shall not be issued until the requirements fixed by the board shall have been complied with [when issued they shall be in force, unless revoked, until ten days after the third Tuesday in May next succeeding the granting of such license, and, in the city of New York, until fifty days thereafter.] (Section 4, id.)

* 3.

The portion of above section in brackets has been superceded.

§ 16. Each of said boards of commissioners of excise, shall have the right to appoint a clerk for the time they may be actually in session, in accordance with the provisions of this act, such clerk to receive the same compensation as is allowed by this act to each of the commissioners. They shall keep a book of minutes of proceedings, on which shall be entered the names of all applicants for license, and they shall also enter on said book a list of all licenses granted, with the names of the parties to whom the same are granted, and the names of the securities to the bond required in each case The said book of minutes shall be deposited in the

office of the county clerk. No fee or reward shall be taken by any board of excise, or by any member thereof, or by any clerk thereof, for any license to keep an inn, tavern or hotel, or to sell strong or spirituous liquors, or for any service required of such board; nor shall any compensation be retained by any such board, or by any member thereof, or by any clerk thereof, out of the excise money, but the whole amount thereof shall be paid over to the county treasurers for the use of the poor in the several counties; but the persons composing such board of excise shall be entitled each to receive the sum of three dollars per day for services actually performed, to be allowed and paid in like manner as other county charges, and no other or greater compensation shall be allowed. The expenses of procuring necessary books for minutes, and necessary blanks, when actually incurred, shall be audited and paid in like manner as other county charges. (Section 5, id.)

The right to appoint a clerk is repealed. (See section 48.)

We have heretofore alluded to section 6 of the laws of 1857, which follows as our next section, and which has been held by the Court of Appeals as still in force in some particulars, but not in others, without giving very lucid reasons why one part is not still in existence as well as another. As it is our purpose to present the authorities particularly applicable to each section after the statutes have been given, we shall not here give citations, but simply such of our conclusions as we think will assist in understanding the somewhat mixed legislation which we find scattered through the statutes of the last twenty-five years; for instance, it is held that the petition of twenty freeholders is not necessary in an application for a license, under the statute, as amended in 1873 (*ante*, section 12), because the said statute does not name that as one of the preliminary requirements; but it is also held by the same high authority, that section 6 of the law of 1857 is still in force, to the extent that such a license as is mentioned in section 2 of chapter 549, 1873, means hotel licenses, and that the accommodations enumerated in section 6 of the law of 1857, must also be held as contemplated by the act of 1870, as amended in 1873 (*ante*, section 12). The judge writing the opinion in the case al-

luded to, seemed to see harmony possible in the two acts of 1857 and 1870 and their amendments, except as to the petition of twenty freeholders. We hope our readers will be equally as happy in their examinations. We are of the opinion, however, that the ordinary mind will not see this as clearly as the judicial, and therefore venture the remark that, as the excise law affects the people as much or more than any law upon our statute books, that it is but justice to them that it should be made as plain as possible, to the intent that the people should be able to understand and profit by it. We will endeavor to give the judicial construction of these several statutes in their proper place. The act of 1857 being still in force, we will give the balance of that act in this connection, which, at the time of its passage, with the exception of some local statutes, comprised the complete excise law of this State, and in 1870 the statute of 1857, as engrafted upon the law of 1870, became the excise law for the whole State. In now giving the balance of that act, it will necessitate the postponement of the several subsequent enactments until the balance of the act of 1857 if given. Were it possible to so weave the several acts together as to form an orderly and reliable law, covering the whole ground of excise legislation, we should be glad to do so; but it is impossible, and, therefore, the necessary incongruity of arrangement must be accounted for in the disorderly state of our statutes as we find them.

§ 17. License shall not be granted to any person to sell strong and spirituous liquors and wines to be drank on the premises of the person licensed, unless such person proposes to keep an inn, tavern or hotel, nor unless the commissioners are satisfied that the applicant is of good moral character, that he has sufficient ability to keep an inn, tavern or hotel, and the necessary accommodations to entertain travelers, and that an inn, tavern or hotel is required for the actual accommodation of travelers, at the place where such applicant resides or proposes to keep the same; all which shall be expressly stated in such license. And no such license shall be granted except on the petition of not less than twenty respectable freeholders of this State residing in the election district where such inn, tavern or hotel is proposed to be kept,

by them duly signed and verified by the oath of a subscribing witness, and not then unless, in the opinion of the commissioners, such inn, tavern or hotel is necessary or proper; and not more than one license shall be granted on the memorial of the same petitioners or any of them. All petitions upon which such licenses shall be granted shall be filed with the county clerk within eight days. And in case the commissioners shall grant any license contrary to the provisions of this act, they shall be deemed guilty of a misdemeanor. (Section 6, chapter 628, 1857.)

*6

The petition of twenty freeholders being no longer necessary their petitions need not be filed as stated above.

§ 18. Nor shall such license to keep an inn, tavern or hotel be granted until the applicant shall have executed and delivered to the board of commissioners of excise herein provided a bond to the people of this State, in the penal sum of $250, with sufficient sureties, who shall duly justify in the sum of $500, to be approved by the board of commissioners with a condition that such applicant, during the time that he shall keep any inn, tavern or hotel, will not suffer it to be disorderly, or suffer any gambling, or keep a gambling table of any description, within the inn, tavern or hotel, so kept by him, or in any out-house, yard or garden belonging thereto. (Section 7, id.)

*7.

§ 19. Every keeper of an inn, tavern or hotel, in any of the towns or villages of this State, shall keep in his house at least three spare beds for his guests, with good and sufficient bedding, and shall provide and keep good and sufficient stabling, and provender of hay in the winter, and hay or pasturage in the summer, and grain for four horses or other cattle more than his own stock, for the accommodation of travelers; and every keeper of an inn, tavern or hotel in the cities of this State shall keep at least three spare beds, and the necessary bedding, for the accommodation of travelers. For every neglect or default in having either of the articles herein required, such keeper shall forfeit ten dollars, to be recovered by the overseers of the poor for the use of the poor. (Section 8, id.)

*8.

The above section is in force, except in the excepted cities of New York and Brooklyn. (See *ante*, section 6.)

§ 20. Every inn, tavern or hotel keeper licensed under the provisions of this act shall, within thirty days after obtaining his license, put up a proper sign on or adjacent to the front of his house, with his name thereon, indicating that he keeps an inn, tavern or hotel; and he shall keep up such sign during the time that he keeps an inn, tavern or hotel. For every month's neglect to keep up such sign he shall forfeit ten dollars. (Section 9, id.)

* 9.

Some peculiar questions may arise under this section, to which we will call attention in future.

§ 21. No inn, tavern or hotel keeper, who shall trust any person other than those who may be lodgers in his house, for any sort of strong or spirituous liquors or wines, shall be capable of recovering the same by any suit. All securities given for such debts shall be void; and the inn, tavern or hotel keeper taking such securities, with intent to evade this provision, shall forfeit double the sum intended to be secured thereby. (Section 10, id.)

* 11, 18.

§ 22. In all licenses that may be granted (excepting to inn, tavern or hotel keepers) to sell strong or spirituous liquors or wines, in quantities less than five gallons, there shall be inserted an express declaration that such license shall not be deemed to authorize the sale of any strong or spirituous liquor, or wine, to be drank in the house or shop of the person receiving such license, or in any out-house, yard or garden appertaining thereto, or connected therewith. (Section 11, id.)

* 12.

For ale and beer licenses see section 45.

§ 23. Such licenses shall not be granted, unless the commissioners are satisfied that the applicant is of good moral character, nor until such applicant shall have executed a bond to the people of this State in the penal sum of $500, with sufficient sureties, who shall duly justify in the sum of $1,000, to be approved by the commissioners, and to be delivered to the commissioners, conditioned that during the

term for which his license shall be granted he will not suffer his place of business to become disorderly; that he will not sell or suffer to be sold, any strong or spirituous liquors or wines to be drank in his shop or house, or in any out-house, yard or garden appertaining thereto; and that he will not suffer any such liquor, sold by virtue of such license, to be drank in his shop or house, or in any out-house, yard or garden, belonging thereto; and whenever any person is seen to drink in such shop or house, out-house, yard or garden, belonging thereto, any spirituous liquors or wines, forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquor or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein. On any trial for the offense last aforesaid, such occupant or agent may be allowed to testify respecting such sale. (Section 12, id.)

* 12, 13.

A portion of the above section has been declared unconstitutional. (See *post*, chapter 3, section 8.)

§ 24. Whoever shall sell any strong or spirituous liquors or wines, in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit fifty dollars for each offense. (Section 13, id.)

* 15.

§ 25. Whoever shall sell any strong or spirituous liquors or wines, to be drank in his house or shop, or any out-house, yard or garden appertaining thereto, or shall suffer or permit any such liquors or wines sold by him, or under his direction or authority, to be drank in his house or shop, or in any out-house, yard or garden thereto belonging, without having obtained a license therefor as an inn, tavern or hotel keeper, shall forfeit fifty dollars for each offense. (Section 14, id.)

* 16.

§ 26. No inn, tavern or hotel keeper, or any other person licensed to sell any strong or spirituous liquors or wines, shall, either personally, or by his wife, servant, employee or other agent, sell or give any such liquors or wines to any Indian or apprentice, knowing or having reason to believe him to be such, or within the knowledge of such

agent, without the consent of his master or mistress, nor to any minor under the age of eighteen years, without the consent of his father or mother, or guardian. Whoever shall, either personally or by his wife, servant, employee or other agent, offend against either of these provisions, shall forfeit ten dollars for each and every offense, to be recovered by the master of such apprentice or servant, or by the parent or guardian of such minor; and any person who shall, either personally or by his wife, servant, employee or other agent, sell or give away any strong or spirituous liquors, ale, beer or wine to any Indian in this State, or shall sell any beer, ale, wine, or any strong or spirtuous liquor to any minor under the age of fourteen years, knowing or having reason to believe such minor to be under such age, shall be deemed guilty of a misdemeanor, and, on conviction, shall be liable to a fine of twenty-five dollars for each and every offense. (Section 15, 1857, as amended by chapter 420 of the Laws of 1877.)

* 18.

The amendment of this section consisted chiefly in prohibiting the wife, servant or employee from selling the same as the proprietor; and also making the knowledge of the agent necessary as to the fact that the party receiving the liquor is one of the prescribed persons; and also prohibiting any person, by wife, servant, employee or other agent, from selling or giving away any strong or spirituous liquors, ale, beer or wine, to any Indian or minor under fourteen years of age, with knowledge, etc. Knowledge, or intent to violate must be shown.

§ 27. It shall be the duty of every sheriff, under-sheriff, deputy-sheriff, constable, marshal, policeman or officer of police, to arrest all persons actually engaged in the commission of any offense in violation of this act, and forthwith to carry such person before any magistrate of the same city or town, to be dealt with according to the provisions of this act; and it shall be the duty of such magistrate, on sufficient proof that such offense has been committed, unless such person shall elect to be tried before such magistrate, and, unless the offense charged be intoxication in any public place, to require a bond to be executed by

such offender in the penal sum of $100, with sufficient sureties, conditioned that such offender will appear and answer the charge at the next court of oyer and terminer or sessions, to be held in said county, and abide the order and judgment of the court therein, or to commit such offender to the county jail until such judgment of said court, or until he be discharged according to law. And it shall be the duty of the magistrate to entertain any complaint of a violation of this act, made by any person under oath, and forthwith to issue a warrant, and cause such offender to be brought before him, to comply with the provisions of this section; and such magistrate shall, within ten days, cause such bond, together with all papers and affidavits, with a list of the persons and residences of the complainants and witnesses examined before him, to be delivered to the district attorney of the county, whose duty it shall be forthwith to prosecute the same. (Section 16, chapter 628, 1857, as amended by section 1, chapter 856 of the Laws of 1869.)

The chief amendment of this section was to the effect that, if the offense charged be intoxication in any public place, the prisoner was to be disposed of under section 17 as amended. Under the original act, the sureties to the offender's bond were required to justify; by the amendment, they are to be "sufficient." (See *post*, chapter 3, section 3.)

§ 28. It shall be the duty of every such officer, whenever he shall find any person intoxicated in any public place, to apprehend such person and take him before some magistrate of the same city or town, and if such magistrate shall, after due examination, deem him too much intoxicated to be examined, or to answer on oath correctly, he shall direct said officer to keep him in some jail, lock-up or other safe and convenient place until he shall become sober, and thereupon forthwith to bring him before said magistrate, whose duty it shall then be forthwith to try him for such offense; and such person, when thus charged with intoxication in any public place, shall not be allowed his election to give a bond, as provided for in section 16 of this act, for his appearance before the next court of oyer and terminer or sessions; and, upon his conviction by the magistrate of such

offense, such person shall be fined not less than three nor more than ten dollars, in the discretion of the magistrate trying him, and costs at the same rate as in courts of special sessions, and imprisonment in the county jail, work-house or penitentiary until paid, not, however, less than ten days nor to exceed six months. The offense of intoxication in any public place being hereby declared an offense against the provisions of this act, and punishable as above provided, it shall be the duties of such officers to arrest, or cause to be arrested, all such persons when so intoxicated, and of the magistrate to entertain such complaints and make such examination under the penalty of fifty dollars, with full costs of suit, for any neglect to comply with the provisions of this section. (Section 17, chapter 628, 1857, as amended by section 2, chapter 856, 1869.)

This amendment was radical. Under the original section the person found intoxicated was to be brought before the magistrate and examined as to the person from whom he received his liquor; and such intoxication was made a bailable offense, punishable, upon conviction, by a fine of ten dollars and costs, and imprisonment until paid, not exceeding ten days. The farce of making the inquiry as to who sold the liquor is left out of the section as amended, and it gives the justice exclusive jurisdiction to try the offender, no bail being allowed. (See *post*, chapter 3, section 3.)

The amendatory act of 1869, of which the last two sections were a part, also declared that the act as amended should not apply to the Metropolitan police district. This was changed by the act of 1870, which extended the act of 1857 as amended and therein adopted, over the whole State.

It also enacted (section 4, chapter 856, 1869) a declaratory provision, that ale and beer should be regarded as covered by the act of 1857. That act had previously thereto, when alluding to liquor, denominated it under the term "strong and spirituous liquors or wines." In 1869 the statute was made to conform to the decisions of the courts, that ale and beer were intoxicating.

The act of 1869 discriminated, however, for the first time, between hotel and saloon licenses, and allowed licenses to be granted for the sale of ale and beer, for a sum of not less

than ten dollars. In 1870 this provision was also extended over the Metropolitan police district.

The acts of 1870, 1873 and 1877 followed, each recognizing ale and beer to be strong and spirituous liquors. The courts, still in advance of statutory enactments, have, in several instances, held cider to be a prohibited "strong and spirituous liquor," and not to be sold without a license. These decisions were at the *sessions* of several counties, but never reported. The jurors finding, on the proof submitted, that cider was intoxicating.

§ 29. Whoever shall sell or give away any strong or spirituous liquors or wines, or shall suffer any such liquors or wines to be sold or given away, under his direction or authority, to any intoxicated person, shall forfeit not less than ten nor more than twenty-five dollars for each offense. (Section 18, chapter 628, 1857.)

§ 30. It shall be the duty of magistrates and overseers of the poor in any town or city, on complaint and satisfactory proof by a wife, that her husband is an habitual drinker of intoxicating liquors, to issue written notices to all dealers in intoxicating liquors against whom such complaint is made, forbidding the sale or giving of such liquor to such husband for the term of six months from the date of the notice, under a penalty of fifty dollars, with costs, for each and every sale or giving of such liquor, after such notice shall have been given; to be sued for in her own name and for her own use. It shall be the duty of such magistrates and overseers of the poor to forbid the sale in like manner in all cases when a husband shall make like satisfactory proof concerning the wife, and all the provisions of this section shall apply the same in either case. It shall be the duty of magistrates and overseers of the poor, when like proof is made by a parent concerning a child, who is a minor under the age of twenty-one years, or by a child concerning a parent, to forbid the sale in like manner; and all the provisions of this act shall apply as in other cases named above. (Section 19, id.)

§ 31. It shall not be lawful, under the provisions of this act, to sell intoxicating liquors to any person guilty of habitual drunkenness, nor to any person against whom the

seller may have been notified by parent, guardian, husband or wife, from selling intoxicating liquors, and every party so selling or retailing intoxicating liquors, shall, on proof thereof, before any court of competent jurisdiction, be deprived of his license to sell, and shall not be allowed a renewal of said license, and in addition, on conviction, shall be punished by a fine of not less than twenty dollars, nor more than fifty dollars, for each and every violation of the provisions herein set forth. If any inn, tavern or hotel keeper, or any other person or persons whatsoever, knowingly (outside of any poor-house), shall sell or give to any pauper or inmate of any poor-house or alms-house, strong or spirituous liquors, or wines, such person or persons so offending shall be fined twenty-five dollars, and be guilty of a misdemeanor, and on conviction shall be imprisoned not more than sixty days. (Section 20, id.)

§ 32. No inn, tavern or hotel keeper, or other person, shall sell or give away intoxicating liquors, or wines, on Sunday or upon any day on which a general or special election or town meeting shall be held, and within one-quarter of a mile from the place where such general or special election or town meeting shall be held, in any of the villages, cities or towns of this State, to any person whatever, as a beverage. In case the election or town meetings shall not be general throughout the State, the provisions of this section in such case shall only apply to the city, county, village or town in which such election or town meeting shall be held. Whoever shall offend against the provisions of this section shall be guilty of a misdemeanor, and shall be punished for each offense by a fine not less than thirty dollars, nor more than $200, or by imprisonment not less than five days nor more than fifty days, or both such fine and imprisonment, at the discretion of the court. (Section 21, chapter 628, 1857, as amended by section 5, chapter 549 of the Laws of 1873.)

This section, before amendment, only applied to persons licensed, and upon conviction could be imprisoned not more than twenty days. There was no discretion in the court to fine or imprison as in the section as amended.

§ 33. The penalties imposed by this act, except the penalties provided for by sections 15 and 19, shall be sued for and

recovered by and in the name of the overseers of the poor of the town or city in which the alleged penalty is incurred, except in such towns or cities as have no overseers of the poor, in which case said penalties shall be sued for and recovered by and in the name of the board of commissioners of excise of the town or city aforesaid, and paid over to the treasury of the county for the support of the poor of the town or city in which such penalty was incurred, except that in counties where there is no distinction between town and county poor, then for the poor of such county, within thirty days after receipt of the same by such commissioners, overseers or their attorneys. (Section 22, chapter 628, 1857, as amended by chapter 109 of the Laws of 1878.)

* 19.

This section was also amended by section 1, chapter 820, Laws of 1873. As originally passed, the penalties, except under sections 8, 15 and 19, were to be sued for and recovered in the name of the board of commissioners of excise, and paid over to the treasurer of the county for the poor of the county. This was when the commissioners of excise were county officers and appointed as prescribed in the first section of the act of 1857.

Section 8 then gave the penalty to the overseer of the poor for the use of the poor, so that in 1873, when section 22 was amended, it gave all penalties to the overseer of the poor, except under sections 15 and 19, which prescribed special methods of recovery and disposition of proceeds. (See sections 26 and 30, *ante*.)

The act, as amended in 1878, makes a provision for such towns as have no overseer of the poor, in such case making it the duty of the commissioners of excise to prosecute, and also making provision for county poor, in counties where there is no distinction between town and county poor.

By the above section, as amended, all penalties incurred are to be sued for and recovered by and in the name of the overseer of the poor, except under sections 15 and 19.

The reader is requested to observe, by the decisions hereinafter cited, that the forfeiture of a hotel, store or saloon keepers bond, is not regarded as a penalty, and, therefore,

the action upon such bond is not to be brought by the overseer. (See *post*, chapter 3, section 5.)

§ 34. Every bond taken pursuant to the provisions of this act shall, within ten days after the execution of the same, be filed in the office of the clerk of the town or village in which the license shall be granted, and in cities in the city clerk's office. (Sections 23, chapter 628, 1857.)

* 20.

This section has not been changed.

§ 35. Whenever a breach of the condition of such bond, given upon the granting of any licanse, shall happen, it shall be the duty of the commissioners of excise, the supervisor of the town, mayor of the city, or trustees of the village in which the person who shall incur the penalty shall reside, to prosecute the same and recover the penalty therefor. (Section 24, id.)

* 21.

§ 36. Whenever any conviction or judgment shall be obtained against any person, licensed to sell strong or spirituous liquors or wines, for any violation of the provisions of this act, either in a suit for a penalty, or in a suit upon a bond given by such person, it shall be the duty of the justice or court before whom the same shall be had to transmit to the next court of sessions of the county a statement of such conviction or judgment, and the offense for which it was obtained. (Section 25, id.)

* 22.

§ 37. The said court shall cause the person or persons against whom such conviction or judgment was obtained, to be notified to appear on such day as the court shall appoint, to show cause why any such license that may have been granted to him or them should not be revoked. At the day appointed, and on such other days as the court shall appoint, it shall proceed to inquire into the circumstances, and shall revoke the license granted to the person or persons violating the provisions of this act. (Section 26, id.)

* 23.

§ 38. The person whose license shall be revoked shall be incapable of receiving any such license to sell strong or

spirituous liquors or wines for the space of three years from the time of such revocation. (Section 27, id.)

* 24.

§ 39. Any person who shall sell any strong or spirituous liquors or wines to any of the individuals to whom it is declared by this act to be unlawful to make such sale, shall be liable for all damages which may be sustained in consequence of such sale; and the parties so offending may be sued in any of the courts of this State by any individual sustaining such injuries, or by the overseers of poor of the town where the injured party may reside, and the sum recovered shall be for the benefit of the party injured. (Section 28, id; see sections 69 and 70, *post*, Civil Damage Act.)

§ 40. It shall be the duty of courts to instruct grand jurors to inquire into all offenses against the provisions of this act, and to present all offenders under this act, and also all persons who may be charged with adulterating imported or other intoxicating liquors with poisonous or deleterious drugs or mixtures, or selling the same, or with knowingly importing or selling intoxicating liquors or wines adulterated with poisonous or deleterious drugs or mixtures, which offenses are hereby declared to be misdemeanors, to be punished by imprisonment in the penitentiary, work-house or jail, for a period of three months, and by a fine of $100. (Section 29, id.)

The $100 fine and three months imprisonment prescribed in this section, applies only to persons adulterating or importing adulterated liquors, and not to all offenses specified in the act.

§ 41. In case the parties or persons whose duty it is to prosecute for any penalty imposed for any violation of the provisions of this act shall, for the period of ten days after complaint to them that any person has incurred such penalty, accompanied with reasonable proof of the same, neglect or refuse to prosecute for such penalty, any other person may prosecute therefor, in the name of the overseers of the poor of the town in which such alleged penalty was incurred, and in the manner provided by section twenty-two of this act, as the same is amended by section one of

this chapter. (Section 30, chapter 628, 1857, as amended by section 2, chapter 820, 1873.)

We assume that the penalties under sections 15 and 19 are not meant to be prosecuted "by any other person," although the strict reading of the act would so dictate, those penalties being given to private persons.

§ 42. All incorporated companies and persons in this State engaged in conveying passengers, including especially all railroad, steamboat and ferry companies, and all kinds of corporations conveying for hire, persons or property, shall be and hereby are required to refuse employment to all persons who, on good and sufficient proof, shall be shown to indulge in the intemperate use of intoxicating drinks, and any such company which shall retain in its employ any person or persons who shall, on competent proof, be shown to be intoxicated at any period whilst in the active service of said company or person, either as engineer, conductor, fireman switch-tender, commander, pilot, mate or foreman, or be in any way connected with the moving power or management, or whose duty, if neglected, would diminish the security and safety of life, limb or property entrusted thereto, said company or corporation shall be liable to pay a sum of not less than fifty dollars nor more than $100 to the county treasurer in the county where the offense may be committed and proved, before any court of competent jurisdiction. (Section 31, chapter 628, 1857.)

§ 43. In any judgment rendered or recovered on any bond to be given under this act, or for any penalty incurred under this act, the person or persons against whom such judgment shall be rendered shall not be entitled, under any execution issued on such judgment, to the liberties of the jail. (Section 32, id; see *post*, chapter 3, section 11.)

§ 44. Title nine of chapter twenty of the first part of the Revised Statutes, and the act entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, and all other acts inconsistent with the provisions of this act, are hereby repealed. (Section 33, id.)

This concludes the excise law of 1857, every section having been given in full as originally passed or amended by subsequent statutes, except the first section, which related

solely to county commissioners, their manner of appointment, etc., they having been entirely superceded by commissioners in towns, villages and cities. (Section 45.)

§ 45. All the provisions of this act, as amended, shall be held to apply to the sale of ale or beer, except so much thereof as forbids the granting of license to any person, except to such persons as propose to keep an inn, tavern or hotel: and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer for a sum not less than ten dollars to other than those who propose to keep an inn, tavern or hotel; and the provisions of this act shall extend to all portions of the State, except the Metropolitan police district. (Section 4, chapter 856, 1869.)

§ 46. The act entitled "An act to regulate the sale of intoxicating liquors within the Metropolitan police district of the State of New York," passed April 14, 1866, is hereby repealed; and the provisions of the act passed April 16, 1857, except where the same are inconsistent or in conflict with the provisions of this act, shall be taken and construed as a part of this act, and be and remain in full force and effect throughout the whole of this State. (Section 6, chap. 175, 1870.)

It will be observed by reference to the above section, that it extends the law of 1857 as amended or adopted by said section to the whole State, and makes it, so far as unrepealed, or not inconsistent, a part of the act of 1870. The local statutes of different cities and counties, so far as we shall give them herein, we suppose to be still in force, notwithstanding the language used in this section.

§ 47. Licenses granted as in this act provided, shall not authorize any person or persons to expose for sale, or sell, give away or dispose of any strong or spirituous liquors, wines, ale or beer, on any day between the hours of one and five o'clock in the morning. And all places licensed, as aforesaid, shall be closed and kept closed between the hours aforesaid, and at all other times when such selling is not authorized by law; and it shall be the duty of every sheriff, constable, policeman and officer of police to enforce the observance of the foregoing provisions. Nothing herein contained shall be construed to prevent hotels from receiv-

ing and entertaining travelers at any time, subject to the restrictions contained in this act and the act hereby amended. (Section 5, chapter 175, 1870, as amended by section 3, chapter 549, 1873.)

§ 48. In no town or village shall the commissioners of excise created by this act, appoint a clerk of the board of excise. The pay of commissioners of excise in towns or villages shall be three dollars per diem. The moneys arising from licenses in any town or village shall be deposited with the county treasurer, within thirty days after receiving the same, to be expended under the direction of the board of supervisors at their next annual meeting, for the support of the poor of such town. Moneys arising from licenses in cities shall be paid into the treasuries of such cities respectively. The book of minutes kept by the commissioners of excise in any town or village, except when in use by such commissioners, shall be deposited in the clerk's office of such town or village. The expenses of procuring necessary books for minutes, and necessary blanks, in any town or village, when actually incurred, shall be audited and paid in like manner as other town or village charges. (Section 7, chapter 175, 1870.)

* 22, 24.

A portion of section 5 of the act of 1857 (*ante*, § 16), is in direct opposition to the first part of this section, and therefore "inconsistent" therewith and repealed.

§ 49. Any conviction for the violation of any provision of this act, or of the acts hereby amended, by any person or persons licensed, or at any place licensed as herein provided, shall forfeit and annul such license. The board of excise of any city, town or village, may, at any time, and upon the complaint of any resident of said city, town or village, shall, summon before them any person or persons licensed as aforesaid; and if they shall become satisfied that any such person or persons has or have violated any of the provisions of this act, or of the acts hereby amended, they shall revoke, cancel and annul the license of such person or persons, which they are hereby empowered to do, and where necessary to enter upon the premises and take possession of and cancel such license. Upon an inquiry the

said board, or the party complained of, may summon, and the said board may compel, the attendance of witnesses before them, and examine them under oath. (Section 8, chapter 175, 1870, as amended by section 4, chapter 549, 1873.)

Section 8, of the act of 1870 was not of general application, but was limited as to time and place, and is no longer operative, being amended out of existence by the above amendatory section.

It may be well to repeat that villages as such have now no board of excise, unless by special statute. The words "boards of excise of villages" had in contemplation the law of 1870, which created village boards; but the act of 1874 (see *ante*, sections 1 and 2) if not in terms, in fact, legislated village boards out of existence. In reading the law of 1870 and 1873, above given, the word "villages" can be left out, when the sections will be understood in their present meaning.

§ 50. Nothing herein contained shall in any manner apply to any city or town where the majority of voters have voted for, or shall hereafter vote for, local prohibition in accordance with any law providing for such voting, until such city or town shall reverse by vote such local prohibition. (Section 6, chapter 549, 1873.)

§ 51. If any person employed, or who shall be employed, upon the railroad of any such corporation as engineer, conductor, baggagemaster, brakeman, switchman, fireman, bridge-tender, flagman, signalman, or having charge of the regulating or running of trains upon said railroad in any manner whatsoever, be intoxicated while engaged in the discharge of such duties, he shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punishable for each offense by a fine not exceeding $100, or by imprisonment in a county jail for a term not exceeding six months, in the discretion of the court having cognizance of the offense. And if any person so employed, as aforesaid, by any such corporation shall, by reason of such intoxication, do any act or neglect any duty, which act or neglect shall cause the death or injury to any person or persons, he shall, upon conviction thereof, be punishable by imprisonment in

the county jail for a term of not less than six months, or in the State prison for a term not exceeding five years, in the discretion of the court having cognizance of the offense. (Section 41 of an act entitled "An act to authorize the formation of railroad companies, and to regulate the same," passed April 2, 1850, as amended by section 4, chapter 560, 1871.)

A person who, being employed upon any railway as engineer, conductor, baggagemaster, brakeman, switch-tender, fireman, bridge-tender, flagman, signalman, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties, is guilty of a misdemeanor. (Section 420, Penal Code.)

By subdivision 9, section 56 of the Code of Criminal Procedure, the "courts of special sessions, except in the city and county of New York and the city of Albany, have, in the first instance, exclusive jurisdiction to hear and determine charges of misdemeanor committed within their respective counties," as follows: "Intoxication of a person engaged in running any locomotive engine upon any railroad, or while acting as conductor of a car, or train of cars, on any such railroad." And by subdivision 12, "offenses against the laws relating to excise, and the regulation of taverns, inns and hotels." And by subdivision 27, "unlawfully selling or giving to any Indian spirituous liquors or intoxicating drinks." And by subdivision 32, "selling liquors in a court house or jail contrary to law."

§ 52. Licenses to keep taverns, pursuant to the laws of this State, may be granted by the commissioners of excise, in the several cities and towns of this State, or by any board or officers exercising the power of such commissioners, without including a license to sell strong or spirituous liquors, ale, wines, beer or alcoholic drink. And in all such cases the license shall express such restrictions on its face, and a fee of five dollars may be charged for granting such license, and no more; but no such license shall be given until the bond required to be given by tavern keepers is executed and de-

livered to said commissioners. (Chapter 419 of the Laws of 1877.)

(See *post*, chapter 5, section 3.)

§ 53. It shall be lawful for the town board of any town, whose yearly receipts from the excise board are in excess of the amount required to maintain the poor of said town, to expend the balance of the same on other ordinary town expenses. (Chapter 143 of the Laws of 1872.)

By the same chapter, all acts or parts of acts inconsistent with the above section were repealed.

§ 54. Strong, spirituous or fermented liquor, or wine, shall not, on any pretence whatever, be sold within a building established as a court house for holding courts of record, while such a court is sitting therein. (Section 32, Code of Civil Procedure.)

A person violating the last section is guilty of a misdemeanor. (Section 33, id.)

§ 55. In cities and incorporated villages no building, or part of a building, shall be designated as a registry or polling place in which, or any part of which, spirituous or intoxicating liquors are sold. (Section 16, chapter 570, Laws of 1872.)

No lager beer, ale, wine or spirituous liquors shall be allowed on election day in any room used for election purposes. (Section 17, chapter 56, Laws of 1880.)

§ 56. It shall be unlawful to introduce into any poor-house, juvenile reformatory, protectory, house of refuge, jail, penitentiary or prison, or to bring upon the premises thereof, any wine, alcoholic, malt or intoxicating liquors, except upon the written requisition of the medical officer of such institution, or for any trustee, manager, officer, agent, employee or other person connected with any such institution, or the inmates thereof, to use, to offer to others, or to allow to be used within any such institution, or upon the premises thereof, any wine, alcoholic, malt or intoxicating liquors, except by the direction and prescription of the medical officer of such institution, who shall, in every case of such prescription, make a record of the name of the person and the cause for which such prescription is given, in a book kept publicly for such purpose, which

record shall be verified by the affidavit of such medical officer, at least once in every six months. (Section 1, chapter 429, Laws of 1880.)

§ 57. Any person violating this act, upon conviction thereof shall be deemed guilty of a misdemeanor. (Section 2, id.)

§ 58. No minor under the age of fourteen years shall be admitted at any time to, or permitted to remain in, any saloon or place of entertainment where any spiritous liquors or wines or intoxicating or malt liquors are sold, exchanged or given away, or at places of amusement known as dance houses and concert saloons, unless accompanied by parent or guardian. Any proprietor, keeper or manager of any such place, who shall admit such minor to, or permit him or her to remain in, any such place, unless accompanied by parent or guardian, shall be guiity of a misdemeanor. (Section 1, chapter 428, Laws of 1877.)

§ 59. Any person who shall suffer or permit any child under the age of sixteen years to play any game of skill or chance in any place wherein, or adjacent to which, any beer, ale, wine or liquor is sold, shall be guilty of a misdemeanor. And any such child found engaged in playing any such game in any such place may be arrested and detained as a witness against the person so offending. (Section 2, chapter 496, Laws of 1881.)

§ 60. A person who admits to, or allows to remain in any dance house, concert saloon, theater or other place of entertainment, owned, kept or managed by him, where wines or spirituous or malt liquors are sold or given away, any child, actually or apparently under the age of fourteen years, unless accompanied by a parent or guardian, is guilty of a misdemeanor. (Section 290, Penal Code.)

§ 61. A male child actually or apparently under the age of sixteen years, or a female child actually or apparently under the age of fourteen years, who is found frequenting the company of reputed thieves or prostitutes, or a house of prostitution or assignation, or living in such a house either with or without its parent or guardian, or frequenting concert saloons, dance houses, theaters or other places of entertainment, or places where wines, malt or spirituous liquors

are sold, without being in charge of its parent or guardian, must be arrested and brought before a proper court or magistrate as a vagrant, disorderly or destitute child. Such court or magistrate may commit the child to any charitable, reformatory or other institution authorized by law to receive and take charge of minors, or may make any disposition of the child such as now is, or hereafter may be, authorized in the cases of vagrants, truants, paupers or disorderly persons. (Subdivisions 4 and 5, section 291, Penal Code.)

§ 62. The following persons are vagrants:

1st. A person who, not having visible means to maintain himself, lives without employment.

2d. A person who, being an habitual drunkard, abandons, neglects or refuses to aid in the support of his family.

3d. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health.

4th. A person wandering abroad and lodging in taverns, groceries, ale-houses, watch or station-houses, out-houses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself. (Subdivisions 1, 2, 3 and 6, section 887, Code of Criminal Procedure.)

There are other persons named as vagrants in the above section, not necessary to enumerate in this work.

A peace officer must, when required by any person, take a vagrant before a justice of the peace or police justice of the same city, village or town, or before the mayor, recorder or city judge, or judge of the general sessions of the same city, for the purpose of examination. (Section 890, Code of Criminal Procedure.)

The further proceedings, after arrest of a vagrant, are pointed out in title sixth of the Code of Criminal Procedure.

§ 63. Keepers of bawdy-houses, or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, are disorderly persons. (Part of section 899, Code of Criminal Procedure.)

Upon complaint, on oath, to a justice of the peace, or police justice of a city, village or town, or to the mayor,

recorder, city judge or judge of the general sessions of a city, against a person as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant, and bring him before the magistrate for examination. (Section 900, Code of Criminal Procedure.)

The further proceedings, after arrest of a disorderly person, and the punishment, are pointed out in title 7 of the Code of Criminal Procedure.

§ 64. No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act. (Section 22, Penal Code.)

§ 65. A physician or surgeon, or person practicing as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to another person, which produces the death of the latter, is guilty of manslaughter in the second degree. (Section 200, Penal Code.)

§ 66. A physician or surgeon, or person practicing as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act as a physician or surgeon, to another person, by which the life of the latter is endangered, or his health seriously affected, is guilty of a misdemeanor. (Section 357, Penal Code.)

See last section.

§ 67. A person who, either—

1st. With intent that the same may be sold as unadulterated or undiluted, adulterates or dilutes wine, milk, distilled spirits, or malt liquor, or any drug, medicine, food or drink, for man or beast; or,

2d. Knowing that the same has been adulterated or diluted, offers for sale or sells the same as unadulterated or undiluted, or without disclosing or informing the purchaser that the

same has been adulterated or diluted, in a case where special provision has not been otherwise made by statute for the punishment of the offense;

Is guilty of a misdemeanor. (Section 407, Penal Code.)

§ 68. A person, who, with intent that the same may be used as food, drink or medicine, sells, or offers or exposes for sale, any article whatever, which, to his knowledge, is tainted or spoiled, or for any cause unfit to be used as such food, drink or medicine, is guilty of a misdemeanor. (Section 408, Penal Code.)

### Civil Damage Act.

§ 69. Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, against any person or persons who shall, by selling or giving away intoxicating liquors, caused the intoxication, in whole or in part, of such person or persons, and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises. (Section 1, chapter 646, 1873; see section 39, *ante*.)

§ 70. In any action arising for violations of the provisions of this act, any justice of the peace in the county where the offense is committed, shall have jurisdiction to try and determine the same, providing the amount of damages claimed do not exceed $200; in which case, and where the damages claimed do not exceed $500, the justice of the peace before whom the action is commenced shall associate with himself

any other two justices of the peace in the same county, who shall have jurisdiction to try and determine the same. (Section 2, id.

The last two sections constitute what is known as the civil damage law. There have been numerous decisions made upon the same, some of the most important of which are cited and commented upon in a later part of this work. (See chapter 4, section 1.)

§ 71. For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contracts. (Third Revised Statutes [6th ed.], 732, section 1.)

Previous to the passage of the civil damage act, an action might be maintained under the last section by an executor or administrator, against the person or persons who sold liquor to the testator or intestate, known by the seller to be an habitual drunkard, and losing his life while in a state of intoxication. (See *post*, chapter 4, section 1.) And it is not probable that the right of action under this section is taken away by the civil damage act, for that act created a new cause of action, giving the right to recover to certain persons therein specified, when "injured in person or property or means of support," but we assume that a recovery under the last-named act, would bar a recovery under the last section. There are cases where there would be no person to prosecute under the civil damage act, or the injury such that the action could not be maintained, while an action could be maintained by the representatives of a deceased person, under the last section.

### Special Statutes.

Many of the cities and villages in this State have special statutes relating to the excise laws, specifying the manner of appointment or organization of the board of excise, or the disposition of excise moneys, penalties, etc. These statutes, when in conflict with parts of the general excise laws,

govern for the localities specified. Such provisions of the general statutes, however, as are not in conflict with such special statutes, are in force in the localities named.

The most important of the special statutes will now be given for the benefit of the cities and villages interested, and that all may easily know, without research, the law as applicable to all parts of the State, except local legislation in any particular city or village, permissable under their charters.

§ 72. "City and town of Newburgh—'An act to provide for the better support of the poor in the city and town of Newburgh, in the county of Orange;' passed April 4, 1871.

"Sec. 1. The annual report required by the fifth section of the act entitled 'An act for the better support of the poor in the town of Newburgh, in the county of Orange,' passed March 23, 1853, and the several acts amendatory thereof, to be made by the commissioners of the alms-house of the city and town of Newburgh, shall, after the year 1871, be made by said commissioners on the first day of March in each and every year, and shall be signed, filed and published as required by said fifth section of said act.

"Sec. 2. All penalties which may hereafter be incurred for violation, committed either in the city of Newburgh or the town of Newburgh, in the county of Orange, of any of the laws of this State relating to the sale of intoxicating liquors, may be sued for and recovered by the commissioners of the alms-house of the city and town of Newburgh by civil action, in their corporate name, before any justice of the peace of said city or town, or in the county court of Orange county, or in the Supreme Court; and said penalties, when collected, shall be applied to the support of the poor of said city and town.

"Sec. 3. All moneys which shall be collected and received by the commissioners of excise in the city of Newburgh, in the county of Orange, or by any other officers of said city or town arising from licenses granted in said city and town under the laws of this State regulating the sale of intoxicating liquors, or for penalties incurred for violations of such laws committed in said city or town, shall be paid over by the officers receiving the same within twenty days after they

shall receive the same to the commissioners of the alms-house of the city and town of Newburgh, for the support of the poor of said city and town.

"Sec. 4. All fines imposed or hereafter to be imposed by the recorder of the city of Newburgh, or by any justice of the peace of the town of Newburgh, or by any court of criminal jurisdiction in the county of Orange, for drunkenness or violation of any of the laws of this State relating to intoxicating liquors or the sale thereof, committed in the city or town of Newburgh, in the county of Orange, shall be paid over by the officer or officers receiving such fines to the commissioners of the alms-house of the city and town of Newburgh, for the support of the poor of said city and town. (As amended by chapter 739, 1871.)

"Sec. 5. All acts or parts of acts relating to the support of the poor in the city and town of Newburgh, in the county of Orange, and to the sale of intoxicating liquors, so far as the latter are applicable to said city and town, inconsistent with the provisions of this act, are hereby repealed." (Chapter 276 of the Laws of 1871.)

§ 73. "Orange county. The commissioners of excise of the several towns and villages in Orange county (except the city and town of Newburgh) shall pay over to the supervisor of the town, within thirty days after the receipt thereof, all moneys received by them as excise commissioners. Such moneys shall be paid by the supervisor to the overseers of the poor of the town in such sums and at such times as may be needed for the temporary relief of the poor of the town, as may be directed by the town board." (Chapter 533 of the Laws of 1875.)

§ 74. "City of Kingston.—The common council shall appoint three commissioners of excise who shall possess all the powers and perform the duties of boards of commissioners of excise, and be subject to the excise laws of this State, except as modified by this act. They shall meet but one day in each month. The compensation of each commissioner of excise shall be three dollars for each day of actual service. Their expenses for necessary books and blanks shall be audited and paid as other city charges. All license moneys and all penalties for violations of excise

laws or ordinances shall be paid over to the city treasurer for the benefit of the poor of the city, and may be sued for and recovered in the corporate name of the city. (Section 58, title 5, chapter 150, 1872.)

"There shall be a corporation in the city of Kingston by the name of the commissioners of the alms-house of the city of Kingston, which shall possess the usual powers of a corporation for public purposes, and shall be composed of the several alms commissioners of said city. (Part of section 59, title 6, id.)

"The said commissioners shall also have power to receive from the commissioners of emigration all moneys they may become entitled to receive for and on account of foreign paupers relieved by them. They shall also be entitled to receive the excise money received in said city, with all fines, forfeitures and penalties which may accrue to them as such commissioners, together with all money raised in said city for the support of the poor, which said several sums of money shall be applied by the said commissioners to the support and relief of the poor in said city according to the provisions of this title. All the moneys aforesaid shall be first paid to the treasurer of said city, and may be drawn therefrom by the said commissioners, from time to time, as the same may be needed, upon warrants directed to said treasurer, and signed by the president of said commissioners, and countersigned by their secretary, and numbered consecutively as issued. (Subdivision 5, section 60, id.)

"The said commissioners shall also have power, and it shall be their duty, to sue in their corporate name for all violations of the excise laws committed in said city in any court having jurisdiction of such suits. All other suits and proceedings which may, by law, be prosecuted and maintained by the overseers of the poor of a town to enforce civil remedies, shall and may hereafter be prosecuted and maintained, and remedies enforced in the name of the commissioners of the alms-house of the city of Kingston." (Subdivision 6, section 60, id.)

§ 75. "City of Poughkeepsie—'An act to provide for the better support of the poor in the city of Poughkeepsie, in the county of Dutchess;' passed April 26, 1871.

"Sec. 1. All penalties, which may hereafter be incurred for violation, committed in the city of Poughkeepsie, in the county of Dutchess, of any of the laws of this State, relating to the sale of intoxicating liquors, may be sued for and recovered by the commissioners of the alms-house of the city of Poughkeepsie by civil action, in their corporate name, before any justice of the peace of said city, or in the county court of Dutchess county, or in the Supreme Court, and said penalties, when collected, shall be applied to the support of the poor of said city.

"Sec. 2. All moneys which shall be collected and received by the commissioners of excise in the city of Poughkeepsie, in the county of Dutchess, or by any other officers of said city, arising from licenses granted in said city under the laws of this State, regulating the sale of intoxicating liquors, or for penalties incurred for violations of such laws, committed in said city, shall be paid over by the officers receiving the same, within twenty days after they shall receive the same, to the commissioners of the alms-house of the city of Poughkeepsie, for the support of the poor of said city.

"Sec. 3. All fines imposed or hereafter to be imposed by the recorder of the city of Poughkeepsie, or by any justice of the peace of the city of Poughkeepsie, *or by any court of criminal jurisdiction in the county of Dutchess*, for drunkenness, or for violation of any of the laws of this State relating to intoxicating liquors, or the sale thereof, shall be paid over by the officer or officers receiving such fines, to the commissioners of the alms house of the city of Poughkeepsie for the support of the poor of said city.

"Sec. 4. All acts or parts of acts relating to the support of the poor in the city of Poughkeepsie, in the county of Dutchess, and to the sale of intoxicating liquors, so far as the latter are applicable to said city, inconsistent with the provisions of this act, are hereby repealed." (The first four sections of chapter 736, 1871.)

The above act was afterward re-enacted by an act entitled "An act to amend the charter of the city of Poughkeepsie, and to consolidate with it other acts relating to said city;" passed May 20, 1874: being chapter 497 of the Laws of 1874.

The first three sections above being respectively sections 4, 5 and 6 of title 11 of said act, except that the charter added the words in italics in section 3, and again enacted in an amended charter of said city, sections 202, 203 and 204 of chapter 523 of the Laws of 1883.

§ 76. "City of Yonkers.—Portions of chapter 184, 1881, entitled 'An act to revise the charter of the city of Yonkers.'

"The mayor shall nominate and, with the consent of the common council, appoint the commissioners of excise for the city, who shall hold their office and perform all the duties enjoined upon commissioners of excise as provided by law. (Section 18, title 11.)

"The common council shall have power to prohibit the adulteration of wines, liquors, ales, drugs, milk, food and provisions sold or exposed for sale, and the selling or giving away to be drank of any intoxicating liquors to any person under eighteen years of age. (Subdivision 22, section 6, title 6.)

"All laws now in force not inconsistent with the provisions of this act, applicable to overseers of the poor in towns, shall apply to the commissioner of charities, and such commissioner of charities shall have and possess all powers which overseers of the poor of towns now have, or which may hereafter be conferred upon them. (Section 1, title 10.)

"The mayor, any alderman or any police officer shall have power, at all times, to arrest or cause to be arrested, with or without process, any person who shall sell or give away strong or spirituous liquors, wines, ale or beer, within the limits of the city, contrary to law; habitual drunkards; persons found intoxicated in the streets, or engaged in quarreling or fighting, or immoderate riding or driving, or doing anything calculated to endanger persons or property in any of the streets or public places; persons refusing to assist in the extinguishment of fires, or to aid in protecting property thereat; vagrants, mendicants, beggars, common prostitutes, gamblers, persons gathered upon the public streets who refuse to disperse when commanded by any such officer so to do, in addition to those enumerated persons in the first section of title 5, chapter 20 of the first part of the Revised Statutes, all of whom shall be deemed disorderly persons. The said

officers shall have power, with or without process, while in pursuit of such disorderly persons, to enter, or cause to be entered, any building or place, and upon the arrest of any such person to take him before the city judge, to be dealt with according to law. In case the city judge for the time being cannot be found, the officer arresting any such offender may detain him in custody, or commit him to the county jail, or any other convenient place of safe-keeping, until such city judge can be found, not to exceed twenty-four hours. Any such officer shall have power to command assistance whenever he shall deem it necessary." (Section 11, title 11.)

By section 32 of title 3, all penalties, fines, claim or other money received by the commissioners of excise must be paid into the city treasury on or before the last day of the month in which received.

§ 77. "City of Lockport—'An act to authorize the commissioners of excise for the city of Lockport to be elected at the same time and in the same manner as other city officers are elected, instead of being appointed by the mayor;' passed May 13, 1881.

"Sec. 1. Hereafter the commissioners of excise for the city of Lockport, instead of being appointed by the mayor, shall be elected at the same time and in the same manner as other city officers are elected. At the annual election to be held in and for said city of Lockport, on the second Tuesday of April, in the year 1882, there shall be elected three commissioners of excise, who, while acting as such commissioners, shall not hold any other city or ward office, and who shall compose the board of excise of said city, and discharge the duties imposed upon the present board of excise of said city by chapter 175 of the session laws for the year 1870, and the laws amendatory thereof and supplementary thereto; and shall be entitled to receive compensation at the rate of three dollars per day while in session as a board of excise, which shall be a city charge. The commissioners first elected under this act shall be classified by lot, under the superintendence of the mayor, or in case of his absence, of the city clerk of said city of Lockport, who shall attend at the office of the city clerk of said city for such purpose, within ten

days after such election, and the persons drawing for one, two and three years shall serve for such term respectively; and annually thereafter one commissioner of excise shall be elected for a term of three years. The present commissioners of excise in said city of Lockport, and all who may be hereafter appointed prior to the first election under this act, shall only hold their office until commissioners of excise shall be elected under this act and shall have duly qualified, when their term of office shall end. Vacancies occurring in said board, so to be elected, from any cause, other than expiration of term of office, shall be filled by appointment by the mayor of the city of Lockport until the next annual election for city officers, when such vacancies shall be filled by election.

"Sec. 2. The said commissioners shall be voted for upon a separate ballot, which shall be deposited in a separate box, marked 'excise;' and before entering upon the duties of their offices shall each, severally, take and subscribe the constitutional oath of office, and file the same with the city clerk of said city of Lockport, and shall execute a bond with sureties to the treasurer of the said city, to be approved by him, in the penal sum of $3,000, conditioned for paying over to him or his immediate successor in office, within thirty days after the receipt thereof, all moneys received by them as such excise commissioners. Said moneys shall be disposed of by the common council of said city in supporting the poor of said city.

"Sec. 3. Nothing in this act shall affect the provisions of any special act in so far as the same provides for any special disposition of excise moneys or fines.

"Sec. 4. All acts or parts of acts inconsistent with this act, so far as they relate to the city of Lockport and the commissioners of excise thereof, are hereby repealed." (Chapter 269 of the Laws of 1881.)

§ 78. "City of Rochester.—The common council shall have power to make, modify and repeal such ordinances, by-laws and regulations as it may deem desirable; to forbid and prevent the vending or other disposition of liquors and intoxicating drinks to be drank in any canal boat, store or other place not duly licensed; and to forbid the selling, or

giving to be drank, any intoxicating liquors to any child or young person, without the consent of his or her parents or guardian. (Subdivision 3, section 40, chapter 14, 1880.) To restrain and punish drunkards, vagrants, mendicants, street beggars, and persons soliciting alms or subscriptions for any purpose whatever. (Subdivision 11, id.)

"The commissioners of excise of the said city shall make a report in writing every month to the common council, signed by such commissioners and verified by their oath, and shall deliver such report so verified to the city clerk, before the last day of the month, which report shall contain a full, true and detailed statement of all moneys received by them and not before reported as hereby required, with the date and amount of each and every item of money received, and the name and place of business of each and every person licensed (not before reported as aforesaid), and the amount charged in each case. With every such report shall be the city treasurer's receipt, showing that the full amount of moneys so reported have been paid to him. A like verified report shall be made and bear date on the Saturday next before the first Monday of May in each year, and shall be delivered to the city clerk with the treasurer's receipt as aforesaid within two days thereafter." (Section 59, id.)

By section 236 of said chapter, the mayor and aldermen of the said city, by virtue of their offices, shall be overseers of the poor for the said city, and shall possess all the powers and authority of overseers of the poor in the several towns in this State, in relation to the care of habitual drunkards; the binding out and contracting for the service of disorderly persons; and all such other powers as are conferred on overseers of the poor in the respective towns, and shall be subject to the same duties, obligations and liabilities.

§ 79. "City of Troy.—Portions of chapter 328, 1880, entitled 'An act to establish and maintain a police force in the city of Troy.'

"Sec. 1. For the purpose of establishing and maintaining a body of police in the city of Troy, there shall be constituted a board of police commissioners and a police force as herein provided.

"Sec. 11. The said board of police commissioners shall be,

by virtue of their office, commissioners of excise and the board of commissioners of excise of the city of Troy, and shall possess the powers conferred and discharge the duties imposed upon boards of commissioners of excise in cities by law, and there shall be no other board of commissioners of excise in said city. All fees for licenses issued by said board of commissioners of excise of said city, provided for by law, shall be collected and received by said board of commissioners of excise of said city, and shall be paid to the chamberlain of said city of Troy monthly, for the use and benefit of the poor fund of said city, and toward paying the expense of maintaining the poor of said city. The penalties imposed by law for the sale of strong or spirituous liquors, wines, ales or beer without having a license therefor, shall be sued for and recovered by and in the name of the board of commissioners of excise of the city of Troy, and on their recovery shall be paid to the officer at the times, and for the use, benefit and purpose aforesaid. The said board shall have power to employ attorneys and counsel to prosecute actions for the recovery of said penalties, and to audit the fees, costs and disbursements of such attorneys and counsel; and the chamberlain of the city of Troy shall pay such audits out of the moneys received by him as aforesaid. The said board of commissioners of excise shall have power to appoint a clerk of said board at an annual salary not exceeding $1,000, payable monthly. On the first Monday of May, 1881, at twelve o'clock, noon, the term of office and the powers and duties of the person appointed to said last-mentioned office, pursuant to the provisions of this section, prior to the fourth Monday of April, 1881, shall cease and terminate, and such person shall be discharged from duty. On the fourth Monday of April, 1881, or within five days thereafter, the said board of commissioners of excise shall appoint a suitable person to the office of clerk of said board, whose term of office shall begin on the first Monday of May, 1881, at twelve o'clock noon. No compensation shall be paid to said police commissioners for acting as such commissioners of excise." (As amended by section 2, chapter 76, 1881.)

§ 80. City of Brooklyn.—By chapter 863 of the Laws

of 1873, the police and excise boards of the city of Brooklyn, were almost inexplicably interwoven. But by chapter 377, of the Laws of 1880, they were so far separated as to have two commissioners of excise, although the commissioner of police and excise is still the president of the board of excise.

Section 1, title 11 of chapter 863, 1873, declares that there shall be a department of police and excise, to consist of a president and two commissioners of police and excise. By that act the mayor appointed them with the consent of the board of aldermen.

By chapter 377, 1880, it became the duty of the mayor and comptroller to appoint "a proper person to be commissioner of police and excise, and also two proper persons to be commissioners of excise." They failing to agree, the mayor alone was to appoint. Each commissioner so appointed was to take the oath of office and file his bond. Since January 1, 1882, the mayor alone has had the appointing power; the commissioners to hold their office two years at a salary of $2,000 per year each.

As now constituted, the board of commissioners of excise of said city consists of the commissioner of police and excise as president, and two commissioners of excise.

By section 58, title 11, chapter 863, 1873, the said board possesses the same powers, and is subject to the same duties, as are imposed by the general State laws. The said board provides for the granting, decides who shall have, and the amount to be paid for license, and subject to the direction of the common council, provides regulations under which the persons licensed shall sell. The common council have the right to decide as to manner and form of license.

It is the duty of the said board to enforce the excise law and the ordinances of the common council in relation thereto, and to report all violations to the law department immediately with the evidence. Fifteen per cent of the license money, if needed, is to be paid over to the inebriates home for Kings county; also all fines for intoxication and violations of the excise law, and the balance of the excise money goes to the city.

It is made the duty of the attorney and counsel for the city to prosecute actions for fines and penalties.

The substance, rather than the letter, of the excise law applicable to the city of Brooklyn, has been given rather than take up so much space needlessly with a large amount of laws for the city government, which are interwoven with it, but not necessary to be given in this work.

§ 81. "City of Buffalo.—Portions of chapter 436 of the Laws of 1880, entitled 'An act to establish a police department in the city of Buffalo, and to provide for the government thereof,' passed May 27, 1880.

"From and after the time when the board of police created and established by this act shall enter upon the duties of their office, the said board of police shall be the board of commissioners of excise in and for the city of Buffalo, with all the powers conferred by chapter 175 of the Laws of 1870, upon boards of excise in cities, and subject to all the provisions of said chapter, and there shall be no other board of excise in said city. Said board shall have power and authority to revoke any licenses granted by them, or by their immediate predecessors in office, whenever it shall appear to their satisfaction that the person to whom such license shall have been granted is not a person of good moral character, or that such person permits the premises in which liquor is sold, pursuant to such license, to become disorderly, or anything to be done or committed therein or thereon contrary to peace or good order. All fees for licenses which shall be issued by said board of police, acting as such board of commissioners of excise in the city of Buffalo, and all fines and penalties provided for by said chapter, shall be paid to and received by the clerk of the said board of commissioners of excise (which clerk the said board of police acting as a board of commissioners of excise is hereby authorized to appoint), and be by said clerk paid, daily, to the treasurer of the city of Buffalo, and by said treasurer credited to the police fund of said city for the use and benefit thereof, and applied in payment of the expenses of the police department created and established by this act. The said clerk of the board of commissioners of excise shall, before he enters upon the duties of his office,

execute and file with the city clerk of the city of Buffalo a bond, in the penal sum of $10,000, with two or more sufficient sureties, to be approved by the mayor of said city, conditioned for the faithful discharge of his duties as such clerk, and for the accounting for and paying over to the treasurer of the city of Buffalo all moneys which shall come into his hands, or under his control as such clerk. Said bond shall be to the city of Buffalo as the obligee therein, and said city may maintain an action against the said clerk and his sureties on said bond for any breach of the conditions of said bond. The said board may remove said clerk from office at pleasure. (Section 42, id.)

The justices to the police in said city, shall have power to try cases of drunkenness. All fines and penalties imposed by any or either of said justices to the police, shall be paid over every week to the treasurer of the city of Buffalo." (Part of section 23, id.)

§ 82. "Town of Haverstraw, Rockland county—'An act in relation to the temporary relief of the poor in the town of Haverstraw, Rockland county,' passed March 11, 1879.

"Sec. 8. All persons are hereby forbidden from selling or giving any wine, spirituous or intoxicating liquors of any description, to or for any person whom they shall know or have reason to believe to have received aid for himself or family from the overseer of the poor of said town, who or whose family is or are at all dependent upon the overseer of the poor of said town for relief or support. Any person offending against the provisions of this section shall be deemed guilty of a misdemeanor, punishable for each offense by fine not exceeding fifty dollars, or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment. Any person who, upon an order or request of an overseer of the poor of said town to furnish supplies for the relief of any poor person or family, shall furnish or deliver any wines, spirituous or intoxicating liquors of any kind or description, shall be guilty of a misdemeanor, punishable by a fine not exceeding $250, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. This section shall not apply where the wines, spirituous or intoxicating

liquors are furnished or supplied as medicine, in case of actual sickness, upon the written certificate of the attending physician of its necessity, accompanying the order of the overseers of the poor. No evidence shall be received or deemed competent or sufficient proof of the fact, except the original certificate and order received, taken and retained at the time of delivery.

"Sec. 10. Whenever, upon examination by the overseer of the poor, upon any application for relief, he shall ascertain or be informed that the destitution rendering such relief necessary is in part or wholly attributable to the intemperance of the person applying, or of any member of the family, he shall give notice thereof to all vendors of intoxicating liquors in the town or vicinity, and forbid the sale or furnishing to such intemperate person of any wines or spirituous liquors whatever. He shall then forthwith enter in his said book a memorandum of the time and to whom such notice was given. Whenever the overseer of the poor shall ascertain, or be informed of the sale or furnishing any wines or spirituous liquors to any poor person contrary to the provisions of this act, it shall be his duty forthwith to enter complaint therefor and have the offender prosecuted. This requirement, however, shall not be construed to prevent any citizen of said town from making complaint, and procuring the prosecution and conviction of any offender against the provisions of this act." (Sections 8 and 10, chapter 74, Laws of 1879 )

§ 83. "Village of Medina.—Portions of chapter 39 of the Laws of 1874, entitled 'An act to reorganize the village of Medina.'

"The board of trustees shall be the commissioners of excise of said village of Medina, and shall possess the powers and perform the duties of boards of commissioners of excise and be subject to the excise laws of this State, except as modified by this act. They shall meet but one day in each month. The compensation of each commissioner of excise shall be two dollars for each day of actual service. Their expenses for necessary books and blanks shall be audited and paid as other village charges. (Section 1 of title 6, as amended by chapter 453, 1875.)

"The board of trustees, upon application being made therefor, may grant license to sell or dispose of malt, spirituous or intoxicating liquors within said village of Medina, for the period of one year, or until the next annual charter election; provided, that every husband, wife, child, parent, guardian or employer, or other person who shall be injured in person, property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such husband, wife, child, parent, guardian, employer or other person, shall have a right of action in his or her name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons, and the owner or owners of, lesse or person or persons renting or leasing any building or premises, having knowledge that intoxicating liquors are to be sold therein, or having leased the same for other purposes shall permit intoxicating liquors to be sold in such building or premises, that have produced the intoxication in whole or in part of such person or persons, shall be liable, severally or jointly with the person or persons selling or giving such intoxicating liquors, for all damages sustained. All damages and costs assessed or recovered against any person or persons in consequence of the sale of intoxicating liquors, as provided in this section, shall be a lien upon real estate and personal property of such person or persons of every kind, without exception or exemption, and shall continue to be a lien upon the said property until said damages and costs are paid, and any justice of the peace of said county of Orleans shall have jurisdiction of such actions when the amount claimed does not exceed $200. (Section 2 of title 6, id.)

"All habitual drunkards in said village shall be deemed vagrants under the provisions of the second title of the twentieth chapter of the first part of the Revised Statutes, and may be proceeded against accordingly; and in addition to the persons mentioned and described in the fifth title in the twentieth chapter of the first part of the Revised Statutes, all persons who shall be intoxicated in said village under such circumstances as to amount to a violation of the public decency; all persons who shall sell intoxicating

liquors without a license in said village, shall be deemed and are hereby declared disorderly persons in said village, and shall be proceeded against and punished accordingly; and any person charged with any offense specified in this section which is, by existing law, a crime or misdemeanor, may be proceeded against under the present or existing provisions of law, or under the provisions of this act." (Part of section 3, title 5, id.)

§ 84. "Allegany county—'An act providing for the disposal of excise moneys in the county of Allegany,' passed April 8, 1871.'

"Sec. 1. As long as the poor of the county of Allegany shall be supported by the county at large, all moneys derived from excise licenses and fines, in any town or village of said county, pursuant to chapter 175 of the Laws of 1870, entitled 'An act regulating the sale of intoxicating liquors,' and all acts amendatory thereof, shall be deposited with the county treasurer of said county, within thirty days after receiving the same, to be expended under the direction of the board of supervisors of said county, at their next annual meeting, for the support of the poor of said county.

"Sec. 2. All provisions of chapter 175 of the Laws of 1870, inconsistent herewith, are hereby repealed, in so far as the same apply to the county of Allegany." (Chapter 380 of the Laws of 1871.)

§ 85. Richmond county.—Chapter 297, 1373, entitled 'An act for the benefit of common schools in the county of Richmond,' passed April 25, 1873.

"Sec. 1. All moneys collected in the county of Richmond for and on account of licenses, penalties and fines for the sale of liquors, and all moneys which have been heretofore collected for licenses, penalties and fines for the sale of liquors in said county and now in the hands of supervisors, or any of them, or in the treasury of said county, shall be paid over to the treasurer of the said county for the benefit of common schools in the said county; said moneys to be apportioned by the school commissioner of said county among the several school districts thereof, and paid by the county treasurer upon the order of the school commissioner

to the proper school officers authorized to receive the same, in the same manner as prescribed for the apportionment and distribution of school moneys received from the State; provided, however, that all the moneys collected in and received from each town in said county shall be distributed and apportioned among the several school districts in each town respectively.

"Sec. 2. The village of Port Richmond, in said county, is hereby excepted from all the provisions of this act."

§ 86. "City of New York.—Portions of chapter 410, 1882, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York:' passed July 1, 1882.

"Sec. 109. The mayor shall, on the first Monday of April, 1883, and in every third year, nominate to the board of aldermen three good and responsible citizens to be commissioners of excise. Said board shall confirm or reject such nominations. In case of the rejection of such nominees, or any of them, the mayor shall nominate other persons as aforesaid, and shall continue so to nominate until the nominations shall be confirmed. The terms of office of such persons shall commence on the first day of May succeeding the date herein fixed for their nomination. Any person appointed after the commencement of the term, as herein prescribed, shall hold only until the expiration of such term and until a successor is duly appointed and qualified. Any one or more of the commissioners so appointed shall have the power to act as a board of excise until the others shall be duly appointed. They shall, except as herein otherwise provided, hold their offices for three years and until others shall be appointed in their places and have qualified. The mayor shall, from time to time, as often as vacancies shall occur, appoint persons qualified, as aforesaid, to fill the unexpired term of any commissioner who shall die, resign, remove from the city, or be removed from office. Commissioners of excise shall be removed for any neglect or malfeasance in office, in the same manner as provided by law for the removal of sheriffs.

"Sec. 86. The common council shall have power to make ordinances,—in relation to intoxication, fighting and quar-

reling in the streets. (Subdivision 13.) And for regulating boarding-houses and taverns, and preventing the resort of crowds of disorderly persons to them. (Subdivision 34.)

"Sec. 208. There shall be paid annually out of the excise moneys of the city of New York, to the Home for Fallen and Friendless Girls in said city, the sum of $150, for the support of every fallen and friendless girl received and supported by said corporation in their Home for Fallen and Friendless Girls for the year for which such payment shall be made, and a proportional sum for a shorter period in the same year.

"Sec. 210. Said board of estimate and apportionment is authorized, from time to time, and in sums according to its discretion, by resolution of said board, to appropriate all excise moneys derived by the excise commissioners in said city from licenses for the sale of intoxicating liquors, to such benevolent or charitable institutions in said city which shall gratuitously aid, support or assist the poor thereof as may seem to said board deserving or proper; but no such resolution shall be valid unless adopted by a majority vote of all the members of said board; and the comptroller shall draw his warrants in favor of such institutions respectively mentioned in such resolutions according to the tenor thereof, and the chamberlain shall pay such warrants out of the said moneys received for licenses. The term 'poor,' as used in this section, shall only include persons who would otherwise become a charge upon said city as foundlings, orphans, and such prostituted or fallen women or juvenile delinquents as may be committed to or cared for gratuituosly, in or by any reformatory institution, protectory, or juvenile asylum, persons who are supported, relieved, or cared for gratuituosly in or by any charitable institution for the care or relief of the ruptured or crippled, the cure of hip or spinal diseases, the sick or the destitute, friendless or infirm, including the children of volunteers dying in the late civil war, and the care and instruction of idiots, the deaf and dumb, the blind and the insane. No payments shall be made in pursuance of this section except as a *per capita* allowance for the poor and destitute persons actually supported, treated, cared for, or educated in the institutions referred

to in this section, except in the case of the American Female Guardian Society and Home for the Friendless, the Children's Aid Society, and the Shepherd's Fold of the Protestant Episcopal Church, which shall severally receive only the same amounts as provided by other provisions of law.

"Sec. 391. The board of public charities and correction are authorized and empowered to maintain, manage and control an asylum for inebriates erected on land belonging to the city and under their control, and the appurtenances thereto, as in the judgment of said commissioners may be necessary and proper. The said board are also authorized and empowered to appoint and employ all such physicians, surgeons, officers and attendants as may be necessary and proper for the management and direction of said asylum, and the care of the inmates thereof, and to fix the compensation of such employees in the same manner and with the same power as in respect to the persons employed in other institutions under the control of said board.

"Sec. 392. The necessary expense of maintaining such asylum, and its appurtenances, shall be provided for in the same manner as the expenses of the other institutions under the control of the said commissioner. The said board are authorized to demand and receive all fines imposed for intoxication or disorderly conduct in the city of New York, which fines, without any deduction, shall be paid over monthly by the magistrate, clerk or other person who receives the same, to the said board, and shall be by it applied and accounted for as other moneys received by it by virtue of this chapter.

"Sec. 393 The said board shall make all needful rules and regulations for the government of said asylum, and shall provide for the proper support and maintenance of the inmates thereof, and especially for such medical treatment as will be effectual for, or tend to the curing of, such inmates of the habit of inebriety and diseases induced thereby; and they shall have full power and authority to regulate and control the inmates of said asylum, and to establish such provisions for moral and sanitary discipline as they may deem expedient.

"Sec. 394. The estate of any person committed to such

asylum, and the person committed, shall be liable for the support of such person therein, and the committee of every such person shall pay out of his estate such reasonable and proper sum as shall be fixed by the justice or judge ordering the commitment. The said board of public charities and correction shall have authority to bring and maintain actions, in any court of competent jurisdiction, against the committee or guardians of the estate of any person committed to said asylum as aforesaid, or against any person, so committed, for the support and maintenance of such person while in said asylum. Such actions may be brought by said board in the name of the mayor, aldermen and commonalty of the city of New York, and all recoveries had in such actions shall inure to the city of New York, and all amounts collected thereon shall be received by said board, and accounted for in the same manner as all other moneys which it is by law authorized to receive.

"Sec. 395. It shall be lawful for the said board of charities and correction to transfer from the alms-house and work-house under their control, to said inebriate asylum, any person committed to the alms-house or work-house, who, in the judgment of said board, shall be fit and proper subjects for said asylum, and, in their discretion, to return such persons to the alms-house or work-house; provided, however, that no person shall, by reason of such transfer, be restrained of his liberty for a longer term than required by his original sentence or commitment.

"Sec. 413. It shall be lawful for the said board, and it shall have power, in relation to all persons who shall hereafter be committed to any institution under their charge as vagrants, by reason of their being 'persons who shall have contracted an infectious or other disease in the practice of drunkenness or debauchery, requiring charitable aid to restore them to health,' after the same shall have been under medical treatment sufficiently cured to be discharged or to work or labor, in their discretion to detain such person or persons, and transfer or commit them to the work-house until, from the proceeds of their work and labor, there shall have been received by said board, beyond the charge of their support while in said work-house, a sum sufficient to reim-

burse all the expenses of their charge and cure while under medical treatment as aforesaid, provided that under this section no such person shall be detained or committed to said work-house for a longer period than six months.

"Sec. 414. The said commissioners shall not, in the cases where by law they are empowered to discharge vagrants from the institutions under their control, hereafter discharge any of said vagrants from custody before the expiration of their terms of imprisonment, without the written consent of the committing magistrate in each case.

"Sec. 1098. The justices of the Supreme Court, in the exercise of their jurisdiction within the city of New York, the justices of the superior court of said city, and the judges of the court of common pleas in and for the county of New York shall have power to commit to the inebriate asylum, under the control of the commissioners of charities and correction, for a term not to exceed two years, all persons who, being actual inhabitants of the said city, shall be incapable or unfit for properly conducting their own affairs in consequence of habitual drunkenness. Such commitment shall be made by any of said justices or judges, in any case where the facts referred to in this section shall be made to appear by petition or complaint, duly verified and presented by any relative of such habitual drunkard, or by the commissioners of public charities and correction, or any officer of the police doing duty within the said city, and upon return of a commission issued upon such petition or complaint.

"Sec. 1099. Upon the presentation of such petition or complaint, the justice or judge to whom the same shall be presented shall proceed in the same manner as is directed in title 6 of chapter 17 of the Code of Civil Procedure, in relation to the care and custody of the persons and estates of idiots, lunatics, persons of unsound mind and drunkards, and according to the rules and practice of the Supreme Court in such cases.

"Sec. 1100. Upon becoming satisfied, by return of a commission as heretofore provided, that any person is an habitual drunkard and incapable, in consequence thereof, of conducting his or her own affairs, said justice or judge

shall have power, in his discretion, to issue his warrant, committing the person so found to be an habitual drunkard to the custody of the said commissioners of public charities and correction, to be detained in the said asylum for such period, not exceeding two years, as the said justice or judge may deem proper, and such warrant shall be executed by any member of the police, upon the request of said commissioners, or one of them. Any such warrant, duly issued, shall be full and sufficient justification for all acts done by any properly authorized officer, under and in accordance therewith.

"Sec. 1101. Any justice or judge before whom proceedings may be pending under the three preceeding sections may, after filing any complaint, and when in his judgment the circumstances of the case render it proper so to do, commit the person charged with being an habitual drunkard to the said asylum while proceedings on such complaint are pending, and all persons so temporarily committed shall be discharged from said asylum if, on return of a commission, it shall be determined that they are not proper persons to be detained.

"Sec. 1102. Any person committed to the said asylum, by order of any justice or judge as heretofore provided, may be discharged therefrom at any time before the expiration of the time for which such person was committed, upon the order of any justice or judge having jurisdiction as herein provided, upon such justice or judge being satisfied that such person is cured and fit to be released. Application for such discharge may be made by any person, provided, however, that previous notice of such application shall be given in writing to the said commissioners of public charities and correction. Upon any such application being made, the justice or judge receiving the same shall proceed in the same manner as upon writs of habeas corpus.

"Sec. 1464. All persons who, being habitual drunkards, are destitute and without visible means of support, or who, being such habitual drunkards, shall abandon, neglect or refuse to aid in the support of their families, who may be complained of by such families; all persons who shall have contracted an infectious or other disease in the practice of

drunkenness or debauchery requiring charitable aid to restore them to health, shall be deemed vagrants. (Part of section only.)

"Sec. 1465. It shall be the duty of every peace officer, whenever required by any person, to carry, convey or conduct such vagrant before the recorder or one of the police justices, for the purpose of examination. If such magistrate be satisfied by the confession of the offender or competent testimony that such person is a vagrant within the description aforesaid, he shall make up and sign a record of conviction thereof which shall be filed in the office of the clerk of the court of sessions, and shall by warrant, under his hand, commit such vagrant, if not a notorious offender, and he be a proper object for such relief, to the alms-house for any time not exceeding six months, there to be kept at hard labor; or, if the offender be an improper person to be sent to the alms-house, then such person shall be committed for the like time to the penitentiary.

"Sec. 1562. In all cases of arrest for intoxication or disorderly conduct in the city of New York, the police justices shall have power, in addition to holding the party to bail for good behavior, to impose a fine not exceeding ten dollars in each case, or to commit to the city prison not exceeding ten days, each day of imprisonment to be taken as a liquidation of one dollar of the fine.

"Secs. 1998, 2010. It shall not be lawful to sell or furnish any wine, beer or strong or spirituous liquors to any person in the auditorium or lobbies of any place of exhibition or performance, or in an apartment connected therewith by any door, window or other aperture, where any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy or dancing, or any other entertainment of the stage, or any equestrian, circus or dramatic performance, or any performance of jugglers or rope dancing or acrobats is exhibited. (Portions of above sections.)

"Sec. 2013. It shall be the duty of the superintendent of police, sheriff, deputy-sheriff, constable, captain of police, policeman, and every other police officer, to enter, at any time, said places of amusement, and to arrest and convey any person or persons violating any provision of the three

preceding sections,* forthwith, before any police justice or recorder or magistrate having jurisdiction in said city, there to be dealt with according to law.

### Incorporated Villages.

§ 87. By chapter 291, 1870, entitled "An act for the incorporation of villages," all persons found intoxicated in the streets of the village, or persons who shall be guilty of noisy, riotous or tumultuous conduct disturb the quiet and peace of the village, or of any meeting or assembly therein, shall be deemed and are hereby declared to be disorderly persons under this act, and under any rule, by-law or ordinance adopted in pursuance thereof for the punishment of disorderly persons. (Part of section 18, title 8.)

Any trustee or any police constable is hereby authorized to arrest any vagrant or disorderly person, with or without process, and take him or her forthwith before the proper officer. If such officer cannot be found, the persons arresting may detain the person arrested, not to exceed twenty-four hours, until the proper officer to try such person is found. (Section 19, id.)

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* Section 2010 is one of the sections here referred to.

# CHAPTER II.

SYNOPSIS OF THE GENERAL PROVISIONS OF THE EXCISE LAWS RELATING TO THE DUTIES, POWERS AND OBLIGATIONS OF COMMISSIONERS OF EXCISE, OVERSEERS OF THE POOR AND HOTEL KEEPERS.

## SECTION 1.

### Commissioners of Excise.

Commissioners of excise are elected in towns like other town officers, one in each year, and hold their office for three years. They are voted for on a separate ballot, and should take the constitutional oath of office before entering upon the duties of their office. Each commissioner must execute a bond for double the excise money of the preceding year, but need make only one bond during the term of office. The oath of office, and also the bond after being duly approved, should be filed in the town clerk's office of their town before entering upon their duties.

The pay of commissioners of excise is three dollars per day. They should meet in their respective towns on the first Monday of May in each year for the purpose of granting licenses, and at such first meeting should organize themselves as a board, making one of their number chairman, and one secretary. The law provides that the board shall not appoint a clerk, but that means outside their own body; the statute requires them to keep minutes, and, therefore, it is necessary that one of their number should keep them. The secretary so appointed should keep minutes of all their proceedings, as provided by statute, and deposit them with

the town clerk. The secretary can receive no extra compensation as such.

At other times they should meet on application made in good faith, but not oftener than once in each month. All licenses granted by them shall expire on the first Monday of May succeeding the date of granting the same.

The act of 1845, allowing a local option vote, is generally acquiesced in as at least substituted by the election of excise commissioners by the people with power to grant or refuse licenses, and to approve of applicants and their qualifications as well as the discretion to decide whether the applicants have a good moral character or not. This leaves the door open for a refusal to grant any license, as those of extreme views may claim no man to be moral who sells intoxicating liquors, and on this ground alone might not "approve" of the applicant. The board cannot be compelled to grant licenses.

The fee for a hotel license cannot be less than thirty nor more than $150 in towns, nor more than $250 in cities, and where the license is to run for less than one year a *pro rata* fee should be fixed upon. The board must keep a list of all persons and places licensed, and the fee charged, the same to be open for public inspection. The petition of twenty freeholders is no longer necessary.

The board may also grant ale and beer licenses for a fee of not less than ten dollars, and the same rules apply on the applications therefor as above. The board shall grant no licenses, either for hotels or saloons, until all legal requirements have been complied with, and each license granted must be signed by the board, or a majority of them.

The commissioners must not only be satisfied of the moral character of the applicant, but that he has sufficient ability, and the accommodations necessary, and, also, that a hotel is necessary at the place where it is applied for. They shall exact a bond in the sum of $500, with two sufficient sureties, that he will not suffer his house to be disorderly, nor suffer any gambling, nor keep a gambling table in or connected with his hotel.

In granting store licenses the same care is required as to character; the bond must be for $1,000, conditioned that

the applicant will not suffer his place to be disorderly, and that liquors, wines, etc., shall not be drank on the premises. For a saloon or beer license a bond similar to that of hotel keepers must be given by the applicant, who, also, must be a person of good moral character.

The commissioners sue for no penalties except in such towns as have no overseer of the poor, in which case it is their duty to sue for the same penalties, and in like manner, as overseers of the poor.

When complaint is made by any resident of the town stating that a licensed person is guilty of some violation of the excise law, the board, being invested with certain judicial functions, must summon before them the person licensed and complained of, and have an examination of the charges made, and if they are satisfied that the person is guilty of a violation they must cancel, revoke and annul his license. The board has the power to compel the attendance of witnesses on the examination, administer oaths and examine them. The board may employ an attorney to assist them in their investigation, and if they are satisfied that there has been a violation the license must be canceled, and they have the authority to enter the premises licensed for that purpose.

The members of the board, as soon as elected, should see to it that their oath of office and bond are duly filed with the town clerk, as otherwise it might cause a vacancy, and so even if they proceeded to act without so doing. Should they proceed without filing their oath and bond, as between themselves and the public they would probably be *de facto* as well as *de jure* commissioners, but whether they would be in a position to enforce the provisions of the excise laws, would be a vexed question requiring tedious and costly litigation to decide.

Within thirty days after receiving any excise moneys, it is the duty of the commissioners to pay the same over to the supervisor of the town, and they should be careful to take his receipt therefor. Their incidental expenses for books, etc., are to be collected the same as any other town charge.

## SECTION II.

### Overseers of the Poor.

Undoubtedly the duties of overseers of the poor are as difficult under the excise laws as under the poor laws of the State. They are made public prosecutors in very difficult cases. With few exceptions they are to bring all actions of a civil nature for which penalties are liable to be paid under the excise laws. They are men who are not usually, by their business pursuits, qualified to manage difficult legal prosecutions; but the statute having placed the responsibility upon them, they will, at times, be compelled by the force of moral pressure, if not from their ideas of duty, to prosecute for violations of the law. It is a recognized fact that the sale of intoxicating liquors is the cause of a large proportion of the pauperism of the country, so that in nearly all cases the fines and licenses are made to apply, directly or indirectly to the alleviation of distress, or the prevention of crime.

It is made the duty of overseers of the poor to prosecute for the following penalties:

1st. Against hotel keepers for not keeping suitable accommodations, ten dollars. (*Ante*, section 19.*)

2d. Neglect to put up and keep up hotel sign, for each month of failure, ten dollars. (Section 20.)

3d. For taking security for liquors trusted, a forfeiture of double amount intended to be secured. (Sec. 21.)

4th. Selling liquors in quantities of less than five gallons, forfeiture for each offense, fifty dollars. (Section 24.)

5th. Selling liquor to be drank on premises without a license, forfeiture, fifty dollars. (Section 25.)

6th. Against an officer for refusal or neglect to arrest a person intoxicated in a public place, etc., fifty dollars. (Section 28.)

7th. Against a magistrate for refusal to entertain complaint, etc., fifty dollars. (Section 28.)

8th. Selling or giving liquor to an intoxicated person, forfeiture, ten dollars to twenty-five dollars. (Section 29.)

These penalties are to be sued for and collected by and

* References to sections in this chapter are to the statutes in Chapter I.

in the name of the overseer of the poor of the town where the offense is committed, except in towns that have no overseer of the poor, in which case they are to be sued for by and in the name of the board of commissioners of excise of the town, and the money when collected paid over to the treasurer of the county for the support of the poor. (Section 33.)

The overseer may discover what he regards as an omission in the above, in not alluding to the forfeiture or penalty of the bonds given by hotel keepers and other dealers, but it has been held that the penalty of the bond being a contingent liability, and not a penalty imposed, is not to be sued for by the oveerseers. Formerly only one action could be brought by the overseers, viz.: that enumerated in section 19. The other actions that are now given to overseers, were given to the board of commissioners of excise. By section 35 it is declared that, for the breach of the condition of the bond, it shall be the duty of certain parties to prosecute, but does not say in whose name; but as the bond is to the people, the action should be brought in the name of the people. Such an action being for a penalty to the people, it should be brought in pursuance of section 1962, Code of Civil Procedure, by the district attorney or attorney-general.

If the overseers of the poor, when entitled to sue for a penalty or forfeiture, neglect their duty for ten days, after complaint to them with reasonable proof, then any person may bring the action in their name. (Section 41.)

It is assumed that where the punishment for any offense is called a fine, that it is not such as could be collected by the overseer, but must be the result of a conviction in a court of competent jurisdiction. Section 41 seems to contemplate a complaint before commencing a prosecution, but it is not necessary except to give any other person the right of action. But it is the better practice for the overseer to exact satisfactory proof of the violation of some act for which the statute gives a penalty, or have such investigation as makes it satisfactory to him that an offense has been committed, before taking the chances of a prosecution. Every cautious man will prepare himself with weapons before laying down the gauge of battle, and it is far easier to

do this before the excitement of a litigation shall have commenced; then the parties who know the facts necessary to a safe conduct of the action, may have sealed their mouths and will say nothing, or the pressure of the friends of the opposite side has handicapped your best efforts. Owing to public sentiment being in the condition in which we find it, no one cares to come forward to the aid of the officer, and he must make up his mind to receive more blame than plaudits for performing his duty. The courts generally, however, are law abiding and will do their duty when once an action is before them in proper form. When the overseers have neglected to bring the action, and it is brought by some one else, the overseer has no control over it and cannot discontinue it without consent of the person bringing it.

Where there is more than one overseer in a town they should meet and act as a board. The same care is to be observed by overseers of the poor in regard to taking the oath of office and giving bonds as is required by commissioners of excise. The overseers have the right to employ an attorney to bring the action, and conduct their business for them; but the whole penalty and costs must be paid into the county treasury, and the attorneys fees paid as any other services performed for the town or county as the case may be.

The decisions of the courts on the various questions affecting overseers of the poor in excise matters, will be found elsewhere.

## SECTION III.

### Hotel, Saloon and Store Keepers.

To procure a license, the applicant should prepare a petition, in writing, to the board of commissioners of excise, setting forth the kind of license, the place where, the name of the applicant or applicants, and every person interested or to be interested in the business, and present the same at their annual meeting on the first Monday of May, or, if desired, at some later period when the board may be called together for that purpose. He should also execute such a bond as is required by statute, with two

sureties, and tender to the board the fee fixed for such license.

After procuring the license to sell, it should be kept publicly posted in his place of business, and exhibited on demand to any peace officer.

The applicant for license will find his first inquiry to be, am I a man of good moral character? That answered in the affirmative—as it very naturally will be in the case of the hotel keeper—have I sufficient ability and the necessary accommodations to entertain travelers? and then, is there a hotel required where I intend to keep one? If the applicant is really anxious to keep a hotel, there will be no difficulty in his giving affirmative answers to these questions; and if there is a board in favor of granting licenses at all, the applicant has but little trouble in convincing it on these points. (Sections 17 and 23.)

As the question is important as to the applicant's compliance with his bond, especially if his place of business is in the country, where the question of excise is frequently discussed, it is well to say here, that "to suffer his house to be disorderly" within the meaning of the statute, is a matter very easy to accomplish; the allowance of drunkards in his rooms, boisterous and unseemly conduct in frequenters of his house, gambling, keeping of bad characters of either sex in such a public and unseemly manner as to affect public decency, etc. (Section 63.) The keeping of any gaming table (and a billiard table is held to be a gaming table) works a forfeiture of his bond. (Section 18.)

Hotel keepers must keep three spare beds, and sufficient accommodations for man and beast. (Section 19.)

The following are penalties hotel keepers are liable to incur:

1st. Neglect to keep accommodations, penalty, ten dollars. (Section 19.)

2d. Neglect to put up and keep up a sign, per month forfeiture, ten dollars. (Section 20.)

3d. Securities for trusted liquors void, and double the sum intended to be secured forfeited. (Section 21.)

4th. Selling without a license, forfeiture, fifty dollars. (Section 24.)

5th. Selling without license to be drank on the premises, forfeiture, fifty dollars. (Section 25.)

6th. Selling to Indian or apprentice without consent, forfeiture to party injured, ten dollars. (Section 26.)

7th. Selling to minor under eighteen without consent of parent, etc., forfeiture to party injured, ten dollars. (Section 26.)

8th. Selling to Indian or minor under fourteen years, forfeiture to people by fine, twenty-five dollars. (Section 26.)

9th. Selling or giving liquors to intoxicated persons, forfeiture, ten to twenty-five dollars. (Section 29.)

10th. Selling or giving liquors to persons when notified that they are habitual drunkards, penalty, fifty dollars. (Section 30.)

11th. Selling or giving liquors to habitual drunkards, fine, twenty to fifty dollars, and the forfeiture of license. (Sections 31 and 48.)

12th. Selling to any person when notified not to do so by parent, guardian, etc., fine, twenty to fifty dollars, and the forfeiture of license. (Sections 31 and 48.)

13th. Selling or giving to pauper or inmate of poor-house, fine twenty-five dollars, and imprisonment not more than sixty days. (Section 31.)

14th. Selling or giving away liquors on Sunday, etc., imprisonment and fine, thirty dollars to $200. (Section 32.)

15th. For breach of condition of bond, recovery of the penalty, $250. (Section 35.)

16th. Conviction of any offense, forfeits license. (Section 37.)

17th. Selling contrary to law and to persons to whom it is unlawful to sell, liable for the injury. (Section 39.)

18th. Adulterating or selling adulterated liquors, etc., imprisonment three months and fine, $100. (Section 40.)

19th. Selling liquor in court house, misdemeanor. (Section 54.)

20th. Allowing minor under fourteen in certain places, misdemeanor. (Section 58.)

21st. Permitting child under sixteen to play, etc., where liquor is sold, etc., misdemeanor. (Section 59.)

22d. Damages given under the civil damage act. (Sections 69 and 70.)

It will, therefore, be observed that the vendors of intoxicating liquors are hedged roundabout with many requirements, and it stands them well in hand to observe the rules laid down for their guidance. They should carefully read the law affecting their interests, and as near as possible obey it. In many cases they are ignorant of the law, and although ignorance of the law is no protection, there is no doubt but that if they were fully informed of their liabilities under the excise law, they would be more guarded.

The near location of other drinking places also gives the opportunity for a person who is habitually in the habit of using intoxicating liquors of becoming well nigh intoxicated at one place, and then by drinking once at some other place he becomes intoxicated, and it is a severe test of judgment to decide when and where the man became intoxicated. The law requires hotel or saloon keepers, under a penalty of ten to twenty-five dollars, to be correct judges as to whether a man is intoxicated or not. If he sells with a license to a person when not intoxicated, well and good; but he must be careful to know, what is almost impossible, viz.: when a man is intoxicated.

The safest thing to do is to entirely repudiate in a hotel the society of men who make it a practice of drinking to excess. Then the danger of selling to drunken men is avoided, the tone and character of the hotel is elevated, and the moral tone of the place where such hotel is situated is enhanced. And if a hotel keeper is careful, and endeavors to keep within the law, no technical liability is ever pressed or complaint entertained by the courts.

# CHAPTER III.

THE PRINCIPLES OF LAW RELATING TO EXCISE AND MATTERS CONNECTED THEREWITH.

## SECTION I.

COMMISSIONERS OF EXCISE, THEIR ELECTION AND APPOINTMENT, QUALIFICATIONS, POWERS AND DUTIES.

*Election.*—Since 1874 excise commissioners, except in cities, have been elected like other town officers, one in each year. They are not to be a supervisor, justice of the peace, town clerk or trustee of a village. (Sections 1 and 2.*) The ballot should be prepared with care and made to comply with the statute, otherwise an election contest might be the result. Commissioners of excise should be voted for upon a separate ballot. (Section 2.) The ballot should have a caption in one straight line in black ink, in "Great Primer, Roman Condensed Capitals," and the name printed in plain type, with letters of uniform size, also printed with black ink. The ballot should be upon plain white printing paper, without impression, device, mark or other peculiarity whatsoever upon or about it, except the name of the candidates. (Chapter 336, 1880.)

The ballot should be as follows:

FOR COMMISSIONER OF EXCISE.

For Commissioner of Excise,
JOHN DOE.

This ballot should be folded so that only the caption shall

* The sections referred to in this chapter are to the Statutes in Chapter I.

be in sight, and so given to the inspectors, and by them deposited in a separate box marked "excise."

*Appointment.*—In towns vacancies in the office of commissioners of excise can be filled by appointment; town boards having the appointing power. (Section 1.) In certain cities and villages special acts provide for the appointment, election, and who shall be commissioners of excise, and their powers and duties are provided for, while section 4 is general in its application and provides for the appointment of commissioners by the mayors of all cities except New York, Brooklyn and Poughkeepsie. It has been held that when special provision was made in city charters, for the appointment of commissioners of excise, or other provisions specially applicable to city government, that these special provisions were not repealed by the subsequent passage of a general statute purporting to extend over the whole of the State. (*Village of Gloversville* v. *Howell*, 70 N. Y., 287.)

The special acts, and extracts from charters, for certain cities, in relation to appointment of commissioners of excise and other matters relating to the excise laws, are given in the following sections of Chapter I: For New York, sections 4, 6, 7, 8, 9, 10, 86; for Brooklyn, sections 4, 6, 7, 8, 9, 10, 80; for Poughkeepsie, sections 4, 75; Newburgh, 72; Kingston, 74; Yonkers, 76; Lockport, 77; Rochester, 78; Troy, 79; Buffalo, 81; Haverstraw, 82; Medina, 83; Orange county, 73; Allegany county, 84; and to all cities of the State, 11. There are some few other special acts for particular towns and cities in this State, connecting in some slight manner commissioners of excise with the city or village government, which are not considered of sufficient importance to embody in a work of general interest.

Appointments by mayors of cities, or by town boards, or other appointing power, must be in writing and signed by the party or parties making the appointment or the presiding officer. (*People ex rel. Kresser* v. *Fitzsimmons et al.*, 68 N. Y., 515; *People ex rel. Babcock* v. *Murray et al.*, 70 id., 521.) This latter case went twice to the general term (5 Hun, 42; 8 id., 577), and the decision was reversed by the Court of Appeals, where it was held as above.

No particular form of appointment is required, neither is it necessary to be delivered. It is sufficient if it is made in writing and signed by the proper party or his legal representative. (*People ex rel. Kresser* v. *Fitzsimmons*, *supra.*) A commissioner cannot assign or transfer his office, and he can only be divested of it in one of the seven ways pointed out by statute, viz.: death, resignation, removal, ceasing to be a resident, conviction for crime, refusal or neglect to take the oath of office or file his bond, or by a decision of a competent tribunal. (*People ex rel. Babcock* v. *Murray*, *supra;* 1 R. S., 122, § 34.)

*Qualification.*—Once elected or appointed, he should, before entering upon the duties of his office, take and file with the town clerk of his town his oath of office. This oath should be taken before the town clerk or a justice of the peace. A notary public is not authorized to administer oaths of office. (Section 37, article 2, title 3, chapter 11, part 1, Revised Statutes.)

He should also, before entering upon the duties of his office, execute a bond to the supervisor of the town, to be approved by him, in double the amount of the excise money of the preceding year. (Section 2.) There is no time fixed by the statute when the oath and bond are to be executed and filed, except "before they enter upon the duties of their office." The statute provides that any town officer entering upon the duties of his office, without taking the oath of office, shall forfeit to the town the sum of fifty dollars. (1 Revised Statutes, 834, § 55, 6th ed.)

*Powers and Duties.*—Boards of commissioners of excise have the power to grant licenses to such persons as shall be approved by them (section 12), for a license fee of from five dollars to $250. Five dollars for innkeepers license without excise license (section 52); ten dollars and over for ale and beer licenses (section 34), and thirty dollars to $250 for hotel and store licenses. (Section 12.)

Although it is made the duty of the commissioner to file his oath of office and execute his bond before entering upon his duties, yet, if he acts as commissioner without it, under and by virtue of his election, it does not work a forfeiture of the office that can be filled by appointment or election.

One B. was elected as commissioner of excise for three years; he executed a bond which was approved by the town clerk, when it should have been by the supervisor. He met with the other two commissioners and acted with them. Afterward, and during B.'s term, the people of the town, assuming that there was a vacancy by the failure of B. to file a proper bond, at the annual town meeting proceeded to elect two commissioners—K. to fill the supposed vacancy, and Bliss for the full term. After qualifying, Bliss and K. met as an excise board, and granted the defendant a license. B. and L., the other commissioners, met but granted no licenses. The overseer of the poor commenced an action against the defendant for selling liquor without a license. He claimed protection under his license granted by Bliss and K. The court held that B., having acted as commissioner before the election of K., was both *de jure* and *de facto* commissioner, and that the license granted by Bliss and K. was wholly void. (*Cronin* v. *Gundy*, 16 Hun, 520.) The rule is, that where a party claims to hold an office, and performs its functions, his acts are as valid as to the public and third persons as though he rightfully held the office. This may be defeated by judicial proceedings taken to declare the office vacant, but not otherwise. (Id.) There cannot, however, be one officer holding *de jure* and another *de facto* at the same time. (*Boardman* v. *Halliday*, 10 Paige, 223; *Morgan* v. *Quackenbush*, 22 Barb., 72.)

An omission to file a bond by an officer does not make the office vacant. He holds by a defeasible title, and is rightfully in office as to third persons, and the question cannot be raised collaterally. (*Foot* v. *Stiles*, 57 N. Y., 399.) But a different rule prevails where the officer seeks to enforce a right by his suit as such officer. In such a case the defendant may deny the plaintiff's official character, such as his failure to take the oath of office, or give security, and so is not a legal officer. (*The People* v. *Hopson*, 1 Denio, 579; *People ex rel.* v. *Nostrand*, 46 N. Y., 375.) When one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title. (*The People* v. *Hopson*, *supra*.)

Town or county officers may employ an attorney where

the duties devolving upon them make it necessary, it was so held as to commissioners of excise when they were county officers in *The People* v. *Board of Supervisors of Delaware County* (45 N. Y., 196), and the same rule would extend to the overseers of the poor who are directed to perform certain duties and bring certain actions, heretofore devolving upon boards of excise. (See sections 33 and 49.) And the board of auditors, whether they be town or county, must act upon any claim for services. As to the duties of such board, see *People* v. *Supervisors*, *supra*, and *People ex rel. Thurston* v. *Auditors* (20 Hun, 150). The board of commissioners cannot, however, give general powers to an attorney to act in his discretion. The majority of the board must act. (*Board of Excise* v. *Sackrider*, 35 N. Y., 154.) The legal fees and reasonable disbursements for subpœnaing witnesses, etc., if necessary, are a lawful charge by the attorney or commissioner. (*The People* v. *Supervisors*, *supra*.) So are the fees of sheriffs and other officers. (*People ex rel. Kelley* v. *Haws*, 21 How., 117.)

Claims for such services against political divisions of the State, such as towns and counties, should be presented and audited, and, for a failure to audit, mandamus is the correct remedy. But this principle does not extend to village or city corporations existing under special charters: in such cases actions may be brought on failure of the corporation to pay in the ordinary way. (*Buck* v. *The City of Lockport*, 6 Lans., 254.) This is the established rule in this State. (*McCullock* v. *Mayor of Brooklyn*, 23 Wend., 458; *Beard* v. *City of Brooklyn*, 31 Barb. 142; *Ganson* v. *City of Buffalo*, 1 Keyes, 454; *Baldwin* v. *City of Oswego*, 2 id., 132.) Mandamus will not lie in such cases; an action is the only remedy. (*Buck* v. *The City of Lockport*, 6 Lans., 251.)

Commissioners of excise may still bring actions for penalties, where there are no overseers of the poor. (Section 33.)

They should meet as a board, and all should be notified to attend all meetings for the performance of their duties in granting or canceling licenses. But the presumption will be that they did meet, in any actions or proceedings instituted by them in reference to such licenses. It is in-

cumbent upon a defendant to clearly show the contrary. (*Board of Excise of Saratoga County* v. *Doherty*, 16 How., 46; *Board of Excise* v. *Sackrider*, 35 N. Y., 154.) In employing an attorney, the board, or a majority, must act or authorize the act. (Id.)

The duty of revoking licenses depends upon the satisfaction of the board that the licensee has violated some provision of the statute. (*People ex rel. Funke* v. *Board of Excise*, 24 Hun, 195.)

Any number of a board of excise, less than the whole, is not *the* board, so that to serve papers upon the excise board, each member must be served to confer jurisdiction. The board is not a corporation. (*Metcalf* v. *Garlinghouse*, 40 How., 50.)

In their proceedings under section 49, they have the power to proceed on their own volition, or upon complaint, to investigate the propriety of a revocation of the license. If a complaint is made they shall proceed to the examination. They may summon witnesses before them, and swear them, or they may proceed in any manner to satisfy themselves.

A license is a present right and not a vested one. It can be taken away by the same power that conferred it, on the board becoming satisfied that the license was unworthily and improperly bestowed. In exercising their discretion in such matters, the court will not interfere. They cannot be coerced by mandamus or otherwise, and for a mistake they are not liable civilly or criminally. (*People ex rel. Beller* v. *Wright*, 3 Hun, 306–308; *People ex rel. Funke* v. *Board of Excise*, 24 id., 195; *Ex parte Persons*, 1 Hill, 655; *People* v. *Norton*, 7 Barb., 477; *People* v. *Jones*, 54 id., 315.)

Selling beer on Sunday, or keeping open a saloon on that day for a public sale, is a violation of the statute for which the commissioners may, on their motion, or on the complaint of any other person, examine as to the truth of and may cancel the license. (*People ex rel. Presmyer* v. *Commissioners of Police et al.*, 59 N. Y., 95.) It is not a conviction, but simply determines whether the licensed party continues to be a suitable person to sell liquors. The stat-

ute itself determines that a violation of the excise law, by one holding a license, is not a suitable person. (Id.)

Commissioners are entitled to pay for their services, not only in meeting to grant licenses, but for annulling them, or for other necessary labor. (*The Board of Commissioners of Excise* v. *Doherty*, 16 How., 46–50; *People ex rel. Plumb* v. *Supervisors of Cortland County*, 24 How., 119.)

Commissioners are vested with large discretion, and the courts, as has been shown, will not interfere with that discretion, where there is opportunity for its exercise. But when they act willfully and corruptly, and grant a license to an innkeeper, knowing that he is not a man of good moral character, nor a person of sufficient ability to keep a hotel, and that he has not the necessary accommodations to entertain travelers, and that a hotel is not absolutely necessary at the place where he proposes to keep a hotel, they are liable to indictment. They do not act solely as judicial officers. Their duties are so plainly defined that if they willfully disregard them, they are liable. (*People* v. *Norton*, 7 Barb., 477; *People* v. *Jones*, 54 id., 311–315.)

After they have met and decided to grant licenses, they can be compelled by mandamus to do so, but not before. (*Matter of Kelley* v. *Excise Commissioners*, 54 How., 327.) But a mandamus will not be awarded to compel an act by a public officer in respect to which he may exercise judgment or discretion. (*People ex rel. Hammond* v. *Leonard*, 74 N. Y., 443.)

The commissioners are liable criminally for an unlawful and corrupt exercise of the powers vested in them. While they are responsible only for good faith and integrity, they cannot, from corrupt motives, either grant or refuse a license improperly, and shield themselves under the judicial character of their office. (*People* v. *Jones et al.*, 54 Barb., 311.) An indictment for willfully and corruptly granting a license to a person to sell spirituous liquors as an innkeeper, the commissioners knowing that the applicant was not a man of good moral character, nor a person of sufficient ability to keep a hotel, was sustained on demurrer in *People* v. *Norton* (7 Barb., 477). And the reasoning of the court was entirely conclusive. (*People* v. *Jones*, 54 Barb.,

316.) To constitute the offense, the license must have been granted with full knowledge of the facts, and willfully and with intent to violate the statute. (Id.)

## SECTION II.

### Licenses.

By section 2 of the act of 1857 (section 13), there were two kinds of licenses allowed to be granted, one to hotel keepers and one to store keepers. The act of 1869, provided for ale and beer licenses. In 1870 and 1873, section 12 was enacted as it now is, and it was for a time supposed that this section provided for a new kind of license, without limit as to where the liquor should be drank, and that it superceded section 2 of the act of 1857. It was thus held by the general term in *Smith* v. *People* (9 Hun, 446). Justice E. D. Smith, in writing the opinion, says: "The act of 1870, was obviously intended to change the law in regard to the sale of intoxicating drinks, and to introduce a new system, and not to amend an old law. No license is required for the sale of intoxicating drinks of any kind, except the license prescribed in section 4 of the act of 1870. (Section 12.) It prescribes a single form of license for tavern keepers, grocers and store keepers, and all other persons asking a license to sell intoxicating drinks." This was an end devoutly to be wished, by those who wanted as extended licenses as possible. This was in December, 1876. It had been held differently in *O'Rourke* v. *People* (3 Hun, 225), two years before; but Mr. Justice Smith claimed that the decision in *Smith* v. *People* was not necessarily different from the case in 3 Hun, as that was a case of indictment for selling ale.

The case of *The People* v. *Smith* went to the Court of Appeals, and is reported in 69 N. Y., 175, and was reversed, the case in 3 Hun receiving confirmation, and the following seems to be the rule as gleaned from these two cases: Section 12 is not a new law, but a kind of preface to section 13, although passed several years after, and merely explanatory of a previously passed act; that it repealed only so much as did away with the petition of twenty freeholders. The case of *Smith* v. *People* arose in Jefferson county. Smith, the

defendant, was indicted for selling liquor by small measure to be drank on the premises. He admitted selling the liquor, but defended by virtue of a license drawn according to section 12, claiming that that law did not restrict him from selling in small quantities to be drank on the premises, he not being a hotel keeper. Judge Folger wrote the opinion and the decision in the *O'Rourke Case* was thoroughly sustained, and the fact recognized, that a license to sell strong and spirituous liquors (except ale and beer) can only be granted to hotel keepers. That there are three distinct kinds of licenses. *First.* Tavern or hotel licenses, where liquor may be sold in quantities less than five gallons at a time to be drank on the premises. *Second.* To store keepers, to sell all kinds of liquor, and in quantities less than five gallons at a time not to be drank on the premises. *Third.* To sell ale and beer in quantities less than five gallons to be drank when and where the purchaser pleases. (*O'Rourke* v. *People*, *supra.*)

Some curious ideas are suggested by these different classes of licenses as enumerated in the *O'Rourke Case.* In the first class the literal interpretation permits a party to step into a hotel and call for five gallons of whiskey, stating that he desires to drink it on the premises. He may take it to his room in the hotel and drink until it or nature is exhausted. After doing this, until he satisfies the landlord that he drinks it on the premises, he may purchase it by measure again and sell it, if he please, without the landlords knowledge, and the license will not be broken. The crime and penalty would pass from the landlord to his purchaser; so the best intended laws may be defeated.

In the second class of licenses, there is absolutely no restriction, if the store keeper can get the purchaser off his premises. Then he may drink his five gallons at a neighbors, or in his own house.

In the third class, there is no restriction. The licensee may sell a glass or a barrel (a license being unnecessary for an amount exceeding five gallons), and the purchaser may drink it all there or take it off the premises. An ale or beer license, costing ten dollars, authorizes a sale by the drink or by the measure, and to be drank anywhere. A hotel license,

costing from thirty dollars to $250, restricts the sale, and beer is only to be sold like other liquor, to be drank on the premises. This seems to be the doctrine in the *O'Rourke Case.*

Neither store, hotel or saloon keeper may sell between the hours of one and five o'clock A. M. (*The People* v. *Smith*, 69 N. Y., 184.)

The opinions in the two cases last cited cover nearly all the disputed questions upon the different kinds of licenses under the acts of 1857, 1869, 1870 and their amendments, and an exhaustive effort made to harmonize the various acts with each other.

It is a question that is yet undecided, whether non-residents can have a license to sell intoxicating liquors. Section 2 of the act of 1857, absolutely restricted licenses to residents of the town; but the statute of 1870, as amended by the act of 1873 (section 12), makes no such restriction whatever. But as it has been held that most of section 2 of the act of 1857 was left undisturbed, and only one instance given wherein it was repealed, it is uncertain how it may be held if it should come before the courts. Judge Folger, in *The People* v. *Smith* (*supra*), held that the petition of twenty freeholders was no longer necessary in procuring a license, but gave no reason for the opinion. It seems that if section 2 of the act of 1857 was repealed in that particular, that the same reasoning would allow licenses to be taken by persons not residents of the town. The law of 1870 and 1873 declares that the commissioners may grant licenses to any person, and does not limit its being granted to residents, or to persons who present petitions of freeholders, and, without some authority upon the subject, it seems that any person, otherwise qualified, may obtain a license, as the same rule that would make the petition of freeholders unnecessary would strike out the clause limiting licenses to residents.

The matter of annulling licenses has been generally treated under the head of powers and duties of commissioners of excise. There are two methods of canceling or annulling a license. Sections 36 and 37 contained the only methods of their cancellation prior to 1870. The above sections are sections 25 and 26 of the act of 1857, and these sections were

taken almost literally from the Revised Statutes of 1829. The reading of section 36 is very peculiar. "Whenever any *conviction*, etc., shall be obtained in a suit for a *penalty* or on a *bond*, it shall be the duty of the magistrate, etc." Now, *conviction*, in the usual acceptation of the term, means the result of a criminal prosecution, and not a civil suit for a *penalty* or on a *bond*. Surely the ways of excise legislation are past finding out. The courts, in their diligent efforts to give some effect to every statute, hold that *conviction* means, as used in the above sections, the conclusion of a prosecution thereunder, whether civil or criminal. (*The People* v. *Tighe*, 5 Hun, 25, 28.)

The same case holds that the proceedings under section 36 need not be taken when an actual conviction is had; that section 49 gives an additional remedy, and that a conviction, in the ordinary sense, annuls the license from the beginning, and it is no longer any protection to the licensee. (Id.) This may be so; but it is the preferable rule for the commissioners to act at once and make the order revoking the license, and file it in the town clerk's office. Indeed, the statute seems to contemplate such course (section 49), and it is the better practice. If the excise board fails to act, as required by section 49, they may be compelled by mandamus. (*Matter of Hook*, 55 Barb., 257.)

All licenses must be in writing (*Lawrence* v. *Gracy*, 11 John., 179), and signed by the commissioners. And a defendant cannot justify when sued for a penalty under a parol license. (*Lawrence* v. *Gracy*, *supra*; *People ex rel. Babcock et al.* v. *Murray et al.*, 70 N. Y., 521; *People ex rel. Kresser* v. *Fitzsimmons*, 68 id., 514.) And it must be delivered before taking effect. (*Opinion Attorney-General*, 527.) A license illegal for want of authority to grant it, is no defense to an action for a penalty. (*Palmer* v. *Doney*, 2 John. Cases, 346.) A license to keep tavern is a personal trust, and defendant cannot justify under an assigned license. (*Alger* v. *Weston*, 14 John., 231.) It is a mere temporary permit. (*Met. Board of Excise* v. *Barrie*, 34 N. Y., 657.)

A person cannot take two licenses at the same time and in the same house; the one a store and the other a hotel license. (*Benson* v. *Moore & Brundydge*, 15 Wend., 260.

Whether such a condition of things would be sustained by the courts, in a case where an innkeeper held a hotel license, and his bar-tender held a store keepers license, both selling in the same building, is a query.

Where commissioners of excise have granted such licenses with full knowledge of all the facts, they would, of course, refuse to cancel either license. It would probably resemble the case of *Wheeler* v. *Calkins* (17 How., 451), where the judge, on a motion for a second trial on error of judgment in the jury, remarked: "That everything was positively proved, except the defendant's intent that the liquor should be drank out of his house, and it is difficult to see how the jury came to a conclusion favorable to the defendant."

## SECTION III.

### Convictions and Misdemeanors.

Before being fully prepared to understand the matter of criminal prosecutions for selling liquors and violating the excise law, it will be necessary to recall the sweeping manner in which ordinary misdemeanors have been treated by the Code of Criminal Procedure. By section 56 of said code, a large number of offenses have been removed from the grand jury room, and except in the city and county of New York, and the city of Albany, courts of special sessions have, in the first instance, exclusive jurisdiction therein. Subdivision 12 of that section includes all "offenses against the laws relating to excise, and the regulation of taverns, inns and hotels;" subdivision 27, "unlawfully selling or giving to any Indian, spirituous liquors or intoxicating drinks;" subdivision 32, "selling liquors in a court house or jail contrary to law." And hereafter, until a change shall be made, such offenses will no more be sent before a grand jury, unless certified there, under section 57 of said code, but will be tried, in the first instance, by a justice or jury in a court of special sessions. The allusions to oyer and terminer and sessions—in sections 27 and 28, *ante*—will have to be interpreted in the light of the said 56th section of the Code of Criminal Procedure, and so far as those sections contemplate sending the offender to the oyer and terminer

or sessions, they must be taken as repealed, and the prisoner will have to prepare for trial. It will not, however, hinder his having a trial by jury. It has been necessary to thus allude to the changes made in the criminal practice for the better understanding of what follows.

It is almost impossible to read sections 27 and 40, without coming to the conclusion that, whatever is declared an "offense" in the act of 1857 and its amendments, is a misdemeanor, otherwise section 27 would be unmeaning to the ordinary reader. Peace officers are directed "to arrest all persons actually engaged in the commission of any offense in violation of this act," and take the offender before a magistrate, etc. Such magistrate must hold him to bail in the sum of $100, conditioned that he will answer the charge at the oyer and terminer or sessions. These courts are each criminal courts, and not civil tribunals. No provisions are made to collect the penalties named in the act in any such manner, for they are to be collected by action brought in the ordinary way. Section 40 still further confirms this impression, wherein it states what directions shall be given grand jurors. It is true that the latter part of that section, wherein misdemeanors are declared, and their punishment fixed, has been held as relating solely to the offenses named in the section, and therein specified, to wit: adulterating liquors, etc., and had no relation whatever to the first proposition, which ends in the phrase "and to present all offenders under this act;" therefore the first part of section 40 is the only portion that confirms this view. The Court of Appeals still further confirms this in the case of *Behan* v. *People* (17 N. Y., 516–520) and in *Hill* v. *People* (20 id., 363), wherein it was held that all offenses under the excise law were misdemeanors. Were this all the information to be gleaned from the books, it would be easy to declare that the reading was correct. There is no question but that the decision in the *Behan Case* would sustain this view, but as it is not the first time the Court of Appeals has disagreed with itself, a further examination of its opinions sheds further light upon a vexed question. And now it will be necessary to make it possible for every section of the excise

law, relating to this question, conformable to the latest decision of the court of *dernier* resort.

The case of *The People* v. *Hislop* (77 N. Y., 331) holds, that "all *offenses* under this act" are not misdemeanors; that only such offenses as are declared misdemeanors in the act itself, or were made such by some prior statute, can be punished criminally. "That where a statute creates a new offense, making that unlawful which was lawful before, and prescribes a particular penalty therefor, that penalty alone can be enforced: the offense is not indictable." This decision was upon section 29, for selling liquor to an intoxicated person. To harmonize these somewhat apparent incongruities, it will be necessary to review some of the sections of the statute with this rule before us.

The offense specified under section 24 having formerly been declared a criminal offense, as stated in *Behan* v. *People* (17 N. Y., 516), must stand as such still. Sections 19, 20, 21, 24, 25 and 26, are, in the main, re-enactments of sections 8, 9, 11, 15, 16 and 17 of the Revised Statutes of 1829, vol. 1, 679 to 681, and each of these offenses are made misdemeanors by section 25 of said statute (p. 682). By the rule in the *Behan Case*, *supra*, and acquiesced in by the court in *The People* v. *Hislop* (77 N. Y., 331), each of the above sections specify misdemeanors so far as they describe the same offenses as the original Revised Statutes above referred to, and with the exception of the corresponding sections 17, of the Revised Statutes, and 26 of this work, they are the same to all intents and purposes. Said sections 17 of the Revised Statutes and 26 *ante*, coincide only in two things: *apprentice and minor under fourteen years*. Selling to the former under section 26, only makes the vendor liable to a penalty under that section, and to the latter a crime. So as to an apprentice, we must go back to the Revised Statutes as originally passed—section 17, *ante*—for its construction. Selling to a minor under 14, is made a misdemeanor by both statutes. It will be observed that section 26 enumerates several classes, to whom a sale is prohibited in the first part of the section; but by reference to the old statutes as above, it will be seen that it is only as to apprentices that a sale can be made a misdemeanor. It

is a little peculiar why one part of a statute, reading in the same way as to sales to several classes of persons, should be construed as a criminal offense and one a civil. Section 27 must be explained upon grounds not stated in either of the four cases on this subject, and which are cited in this connection. This section enacts, in substance, that any offense under this act is criminal, where an officer finds the offender actually engaged in its commission, and not that all offenses are misdemeanors in any other way; so we have the anomaly of an offense being criminal if the offender is caught in the act, but if he can evade the eye of the officer, no matter how much he may offend the public sense of decency and order, he cannot be arrested as for a crime; this would especially apply under section 29, which defines an offense, but not a crime under the old Revised Statutes. This places a premium upon sly rascality. By an examination of any section, and observing the rules laid down in *People* v. *Hislop* (*supra*), it will be possible to tell what are, and what are not, criminal offenses: *First.* Are they made so by the section itself? *Second.* If not made so by the section itself, was it by a former statute? This will cover the whole ground, except where the sections are somewhat ambiguous or uncertain. Section 28 and section 40 are the only two sections that fall under such definition, and they have been construed by the Court of Appeals, the former in *Hill* v. *The People* (*supra*), and the latter in *Foote* v. *The People* (56 N. Y., 321).

With this review, and an examination of the four cases last cited, the difficulty of construction upon the subject of what are crimes, under the excise law, will be greatly lessened.

One other question remains to be elucidated, which is attempted further on. If the examination of the cases cited raise a commotion in the mind of the examiner, he can console himself with the reflection "that judges are but men, and too err is human." He can also say with Chief Judge Church in *The People* v. *Hislop*: "We may guess that the legislature intended to make all prohibited acts criminal offenses, but it is impossible to so affirm with any degree of certainty;" or with Judge Pratt, in *Behan* v. *The Peo-*

*ple*, "the statute under consideration appears upon its face to have been carelessly framed;" or with Judge Folger, in *Foote* v. *The People*, "a careful perusal of its various sections induces the idea that many sections were framed and adopted with no thought of others in the act, so far as the grade of offense or the degree of punishment was concerned."

The following are the head notes of the four cases above referred to:

"The sale of spirituous liquors or wines, without license, in less quantity than five gallons at a time, though not among the offenses specially declared misdemeanors by chapters 628 of 1857, is punishable by indictment." (*Behan* v. *The People*, 17 N. Y., 516.)

"A person accused of being intoxicated in a public place, under chapter 628 of 1857, cannot be summarily tried before a justice of the peace unless he so elects, but is entitled to give bail for his appearance before the next court of oyer and terminer or general sessions.

"The statute having made intoxication in a public place a criminal offense, the accused cannot be deprived of the right of trial by jury." (*Hill* v. *The People*, 20 N. Y., 363.)

"The provision of section 29 of the act of 1857, to suppress intemperance and to regulate the sale of intoxicating liquors (chapter 628, Laws of 1857), declaring certain offenses to be misdemeanors and prescribing the punishment therefor, applies only to the specific acts just before enumerated in said section, and not to each and every of the offenses under the statute unaccompanied by a particular provision characterizing the offense and fixing the punishment.

"An offense against the provisions of the 13th section of said act, *i. e.*, the selling of strong and spirituous and intoxicating liquors in quantities less than five gallons, without a license or authority of law, is a misdemeanor, punishable as prescibed in the provision of the Revised Statutes (2 R. S., 697, § 40), fixing a punishment for misdemeanors not otherwise provided for.

"Where, therefore, upon conviction of an offense under said section 13, the court below imposed the punishment prescribed by section 29, deeming itself destitute of power

to do otherwise, and basing its action expressly upon that ground, held, error, and judgment therefor reversed and case sent back for such punishment to be imposed, as, in accord with law and in the discretion of the court, is meet." (*Foote* v. *The People*, 56 N. Y., 321.)

"Where a statute creates a new offense, making that unlawful which was lawful before, and prescribes a particular penalty therefor, that penalty alone can be enforced; the offense is not indictable.

"Accordingly held, that the offense of selling liquor to an intoxicated person, created by the excise law of 1857 (section 18, chapter, 628, Laws of 1857), was not indictable and punishable as a misdemeanor." (*The People* v. *Hislop*, 77 N. Y., 331.)

For a proper understanding of these decisions, it will be necessary to call attention to the fact that, except in the city and county of New York and the city of Albany, the criminal offenses under the excise law are in the first instance, and exclusively under the jurisdiction of courts of special sessions. (Subdivision 12, section 56, of the Code of Criminal Procedure.)

Section 27, as well as other sections of the excise law, must now be read with special reference to the foregoing provisions; and the case of *Hill* v. *The People* (*supra*), which was prior to the amendment of 1869, must be read in connection with section 28 as then amended.

The chief remaining difficulty as to the construction of the criminal part of the excise law, arises under such sections as the 32d, where the sale is by the wife or servant. It has been held that to charge an innkeeper criminally, for selling liquor contrary to law, an intent to violate the statute must be shown. That a sale on Sunday or election day by the bartender, although of frequent occurrence, is not sufficient to convict. It must be shown that the innkeeper in some way participated in, or connived at it. (*The People* v. *Utter*, 44 Barb., 170.) That the question of intent should have gone to the jury, and they, no doubt, would have been authorized to have found that, frequent sales by his agent, was some proof that it was known or assented to by the proprietor; and a finding of the jury to that

effect would not have been disturbed on appeal. (Id.) Strong presumptions of fact, shift the burden of proof, even though the evidence to rebut them involve the proof of a negative. (Best on Evidence [Woods ed.], 599.)

In the case of *The People* v. *Utter* (*supra*), the court held, that the presumption of innocence could not be overcome, by simply showing that the sale was made on his premises by his bar-tender; that it was also necessary to show that the defendant in some manner participated in it, connived at or consented to it. "The presumption of innocence is favored in law." (Best on Evidence, 620.) "This is a well known rule and runs through the whole criminal law." (Id.)

A pauper married; her husband went away as a soldier into service, and for a year was not heard from. She married again, and the question came before the English courts as to the legitimacy of the offspring of the second marriage. Here were conflicting presumptions; and the court held, that the presumption of legitimacy ought to prevail, and in a criminal case would have been conclusive. (Id., 620.)

There is an old maxim known to every lawyer, that every man is presumed innocent until proved guilty. Innocence of crime is always presumed in law, guilt never. And as the law makes it a crime to sell liquor in certain cases, a reasonable proof of guilt by actual proof, or strong presumption, should be made before conviction, and when there are conflicting presumptions, the question should be left to a jury. In an action to recover a penalty, however, the rule would be different. It is only where a man's liberty is in jeopardy that this rule extends.

The case of *The People* v. *Utter* has received confirmation in *Smith* v. *Reynolds* (8 Hun, 128, 130). Mr. Justice Mullin there adopts the rule laid down in Story & Paly on Agency. "The general rule is, that the principal is responsible, civily, for the acts of his agent; but not criminally, unless done under his express authority. That in a civil suit for the tortious act of the servant, the principal is liable."

The provisions of section 27, by which the sum of $100 is prescribed as the penalty of the bond to be taken where a person is arrested and brought before a magistrate, charged with being found actually engaged in violating that act, is

not applicable to the case of a person indicted under section 32, and afterward arrested under that indictment. In the latter case the bail is not fixed by statute, but is left to the discretion of the magistrate. (*The People* v. *Page*, 3 Park. Cr., 600.)

The 32d section, which declares it a misdemeanor for an inn, tavern or hotel keeper or person licensed to sell liquors, to sell or give away any intoxicating liquors or wines on Sunday, is not applicable to persons other than those thus designated, and it is not, therefore, an indictable offense, under the statute, to sell or give away intoxicating liquors or wines on Sunday, when the act is done by a person who is not licensed to sell liquors, or who is not the keeper of an inn, tavern or hotel. (Id.)

For the selling of such liquors on Sunday by persons not enumerated in the 32d section, the only punishment is the infliction of a money penalty provided for selling without a license by other sections of the act of 1857, and there is no distinction in the kind of punishment, whether the sale be made on Sunday or on any other day of the week. (Id.)

## SECTION IV.

### Actions for Penalties, and by Whom Brought.

*By Overseer of the Poor.*—As stated by section 33, actions for penalties must be brought by and in the name of the overseer of the poor, except in those cases mentioned in sections 26 and 30. Those are actions where the penalties are given to the party injured, or some party for him. An action may be brought on the overseer's own motion, or on a complaint made by some proper party. The money realized from any actions he may bring, is to be paid over to the county treasurer, as provided in section 33. Previous to 1870, such actions were to be brought by the board of commissioners of excise, who were then county officers, and the cases hereinafter cited are in the main relative to actions brought by them; but as the overseers of the poor now act in the same capacity as the board of commissioners of excise formerly did in bringing actions for penalties under the excise laws, we may read understandingly, by using town and

town officers in place of county and county officers, and overseers of the poor in place of commissioners of excise.

The overseer of the poor may employ an attorney to prosecute for penalties, and as they are agents for the town in so doing, the compensation for such services are a town charge, but can only be collected by audit of the town board. Liberty has been taken above to substitute certain words in place of others in order to conform to the present condition of the statute. (*Buck* v. *City of Lockport*, 6 Lans., 251; *People ex rel. Johnson* v. *Supervisors*, 45 N. Y., 196.) The expenses of witnesses and official fees are governed by the same rule. (Id.; *People ex rel. Kelly* v. *Haws*, 21 How., 117.)

As stated (*ante*, § 1), the overseer must be sure of the regularity by which he holds his office, when he brings an action as such, as the defendant may set it up as a matter of defense; but when he comes into court he may prove the character in which he sues, by reputation, after which the burden would be upon the defendant. (*Blatchley* v. *Mosier and ano.*, 15 Wend., 215; Abbott's Trial Evidence, 40.)

The overseer, in bringing actions for penalties, must stand or fall as a town official. He cannot mix his personality with his official position. He is solely the instrument of the town in seeing the law executed, when it is right and proper for him so to do. He should be above bribery or undue influence. Indeed, he is intrusted with important public duties.

His first care, when complaints are made to him, should be to investigate and decide if there is reasonable proof of the alleged infringement. If he neglects or unreasonably refuses to prosecute, the law places it within the power of any other person to prosecute for the penalties in his name. (Section 41.) This will be disagreeable to all concerned, and the town is thereby prohibited from having its own agent attending to its business.

As stated above, his personal and official duties are entirely separate. In one case an overseer borrowed money of the defendant; he afterward brought an action against him for a penalty, for selling liquor without a license. The defendant set up the borrowed money as a counterclaim. The

court held this to be improper. (*Denniston* v. *Trimmer*, 27 Hun, 393.) The statute does not authorize an overseer, as such, to borrow money, and if he does so it is as a private individual and not as a town official. (Id.)

*When Brought by Other Persons.*—Section 41 confers the right upon others than overseers to bring the action for penalties, where complaint and reasonable proof of a violation of some provision of the excise law, has been made and presented the overseer, and he has neglected or refused to prosecute for the penalty.

Care should be exercised in every case of that kind, otherwise the person may become liable to pay the costs of the prosecution. If he brings the action without a full compliance with the preliminaries laid down to entitle the action to be so commenced, he will be personally liable for costs. (*Jobbit* v. *Giles*, 22 Hun, 274.)

A difficulty may arise, however, when he has complied with the statutory requirements. After the action has been regularly brought, the defendant may make a motion to compel security for costs, under section 3271 of the Code of Civil Procedure, and it is within the discretion of the court whether to order it or not. The contrary rule was held in *Board of Commissioners of Excise* v. *McGrath* (27 Hun, 425); but in *Sharp* v. *Fancher* (29 id., 193), the case in 27 Hun was held not to be binding, as that question was not necessary to the decision of the case then before the court. (See, also, *Board of Commissioners* v. *Cassiater*, 62 How., 113.) This question has not yet been decided by the Court of Appeals, and until it is the case of *Sharp* v. *Fancher* (*supra*) must be accepted as binding.

The complaint to the overseer should be so definite, and should be accompanied with such proof, as to satisfy the overseer that a penalty has been incurred, or to enable him to investigate and decide whether or not there has been a violation of the statute. (*Jobbit* v. *Giles*, 22 Hun, 274.) In this case there was a complaint presented under oath, on information and belief, but making only general charges of sales of all sorts of liquors, naming kind, and in each of five months of the year, but specifying no person to whom any sale or any amount had been sold. The court held such a

complaint and such proof insufficient, and the party commencing the action was charged with the costs. (See, also, *Barlow* v. *Pease*, 5 Hun, 564; *Sutter ex rel. Reeve* v. *Fauble*, 25 id., 195; *Hess* v. *Appell*, 62 How., 313.)

Where, however, the action has been once properly brought, the overseer cannot discontinue the action without the parties consent. (*Record* v. *Messenger*, 8 Hun, 283.) Should any other person commence the action in the name of the overseer, without having made the proper complaint and furnished the "satisfactory" proof, the overseer may move to discontinue the action. (*Hess* v. *Appell*, 62 How., 313.) As to what is necessary to enable some other person to bring the action in the name of the overseer, see *Hess* v. *Appell* (62 How., 313), *Board of Commissioners* v. *Purdy* (36 Barb., 266), *Thayer* v. *Lewis* (4 Den., 270), *Jobbit* v. *Giles* (22 Hun, 274), *Barlow* v. *Pease* (5 id., 564).

*How Brought and Maintained.*—In bringing an action for a penalty, where the summons is served without the complaint, there must be indorsed upon the copy of the summons served a reference to the statute giving the penalty in substance, as follows: "This action is brought in accordance with the provisions of [*here insert the section, chapter and year of passage of the act under which the action is brought, as stated at the bottom of the statute sections of this work*]. (Section 1897, Code of Civil Procedure.)

If the complaint is served with the summons, no endorsement referring to the statute is necessary. (*Thayer* v. *Lewis*, 4 Denio, 269.) The action may be entitled as follows: John Doe, as overseer of the poor, etc., against Richard Roe. (*Hait* v. *Benson*, 18 How., 303.) It seems the action may also be entitled: "The Overseer of the Poor, etc., against Richard Roe," without naming the overseer by name, but this is not recommended.

The overseers have, like commissioners of excise, reasonable discretion in many instances, and where judgment or discretion is allowed by law to be exercised, a mandamus will not lie to compel the officer to act. (*People* v. *Fairchild*, 67 N. Y., 334; *Perry* v. *Tynen*, 22 Barb., 137.) Yet when it is necessary to compel the officer to do his duty

that is plainly pointed out, a mandamus is the proper remedy. (*People ex rel. Hammond* v. *Leonard*, 74 N. Y., 445.) An overseer cannot be compelled to continue an action for a penalty where he is satisfied that his action is not maintainable. (Id.)

It may be urged that all actions for penalties should, under section 1962 of the Code of Civil Procedure, be brought by the district attorney or the attorney-general, but the answer to that is, that the "poor of the county or town are not the people;" therefore the penalties to be prosecuted for by the overseers, and which are for the benefit of the poor, are not "penalties incurred to the people of the State, or to an officer, for their use," as stated in section 1962. The attorney-general, in an action brought by him, represents the whole people and a public interest, and not mere individual rights. (*People* v. *Brooklyn, F. and C. I. R. Co.*, 89 N. Y., 76, 93.)

Power is conferred upon overseers of the poor to bring actions for penalties, although the cause of action accrued before the commencement of their term of office. (Section 1926, Code of Civil Procedure.)

In prosecutions for a penalty, the plaintiff need not prove disqualification of defendant, such as that he sold without a license. The *onus* is upon the defendant. It must be alleged, but need not be proved. It is a fact peculiarly within defendant's knowledge, and, therefore, the burden of proof is upon him to show that he had a license. (*Potter* v. *Deyo*, 19 Wend., 361; *Harris* v. *White*, 81 N. Y., 548; *Fleming* v. *People*, 27 id., 329.)

It has been held in certain cases that only one penalty could be collected for an offense described in any one statute. Such was the decision in the case of *Washburn* v. *McInroy* (7 John., 134), under the excise law, as contained in the first revised laws, page 176, section 7. This statute did not, however, contain the same phraseology as our present excise laws. The term there used was, "Shall forfeit twenty-five dollars," while the corresponding section now adds, "For each offense." Under another statute giving a penalty, the court held (*Fisher* v. *N. Y. C. and H. R. R. R. Co.*, 46 N. Y., 659): "But one penalty can be recovered

for all offenses committed prior to the commencement of the action."

But in *Suydam* v. *Smith* (52 N. Y., 388, 389), the foregoing cases were distinguished, and it was there held in substance that, where a statute gives a penalty *for each offense*, that all the different offenses proven under such a statute may be recovered in one action, notwithstanding they are of the same nature, if they are charged and proved as having been committed at different times. This may be regarded as the settled practice. Care should be taken, however, to make the charge in the complaint conform to the offense named in the particular statute under consideration, and then the proof must conform to the allegations in the complaint.

A complaint for selling liquor without a license, will not be upheld by proof that a store-keepeer with a license sold liquor to be drank upon the premises, although had such a charge been made, and such proof furnished, the action might have been maintained.

In an action to recover a penalty under section 26, for the sale of liquor to a minor under eighteen years of age, the plaintiff has the burden of showing that the defendant knew or had reason to believe that the person to whom the sale was made was under the age of eighteen years. The words of the statute apply to minors as well as apprentices. (*Perry* v. *Edwards*, 44 N. Y., 223.) This is as applicable since the amendment of section 15 of the act of 1857, as before; the change does not effect this decision. This rule would probably apply to other cases where the innkeeper is to exercise his judgment. (Id., 228.)

When a statute declares both a penalty and a misdemeanor for doing any one act named, like selling liquor without a license, they are entirely independent of each other, and a conviction for the offense is no bar to an action for the penalty, and *vice versa*. (*People* v. *Stevens*, 13 Wend., 341; *Blatchley* v. *Mosier*, 15 id., 215.)

The action for penalties against hotel, saloon and store-keepers, are generally caused by some citizen, or class of citizens, who are adverse to a free and untrammeled traffic in intoxicating liquors, and the proof in support of the alleged

violations are furnished by informers or evidence prepared for the purpose of conviction, and in such cases the licensee claims frequently that the informer and plaintiff are *particeps criminis* with the offender, and that the action ought not to be maintained.

In the case of *The Board of Commissioners of Excise of Onondaga County* v. *Backus* (29 How., 33), the court indulges in some facetious remarks upon that subject, and others arising in the case. The informer called for gin, and got what he thought was whiskey, and paid for it. The defendant claimed there was no proof of the offense charged. The court held that although the witness might not be correct in what he thought the liquor was that it was near enough to the fact. That as the witness called for gin, and the liquor was furnished in pursuance of the call, the defendant cannot deny that it *was* gin, although it might have been whiskey. That the defendant having christened it and sold it as gin that he cannot repudiate his own offspring, when its legitimacy is called in question, and so gin it must remain. The court also held that the plaintiffs were not, even on the assumption that the witness was an informer and bought the gin under the plaintiffs direction, *particeps criminis* and *pari delicto* so as to prohibit a recovery.

One having a license to sell lager beer cannot sell and deliver the same outside of his own town and in a town where no licenses are granted. A licensed brewer in Glens Falls, through an agent, took and filled orders for the sale of bottled lager beer. The agent received an order from Corinth, a town where there were no licenses granted, for a case of such beer. The Glens Falls dealer filled the order by delivering the beer at Corinth, where the agent was paid by the purchaser. This was held to be a sale at Corinth, and the agent, who was the defendant, could not justify under the license of his principal, but was held liable for selling beer in Corinth without a license. This was a criminal prosecution, but the principle would be the same in an action for a penalty. (*People* v. *Capen*, 26 Hun, 377.)

A husband is liable for a penalty for his wife selling liquor without a license. (*Hasbrouck* v. *Weaver*, 10 John., 247; *Board of Commissioners* v. *Keller*, 20 How., 280;

*Schaus* v. *Putscher*, 25 id., 463; *Horton* v. *Payne*, 27 id., 374; *Commissioners of Excise* v. *Dougherty*, 55 Barb., 332; *Smith* v. *Reynolds*, 8 Hun, 128.)

An agent is personally liable for his own wrongful acts, and he cannot relieve himself by claiming that he acted as agent. An agent selling on Sunday, or where he or his principal has no license, is liable for the sale. (*Board of Commissioners of Excise* v. *Dougherty*, 55 Barb., 332.)

As to well known beverages, such as whiskey, brandy, gin, wine and strong beer, the courts, without proof, acting upon their own knowledge, derived from observation, will take notice that they are all intoxicating, and require no proof of the fact. (*Rau* v. *The People*, 63 N. Y., 279.) It is not necessary to constitute an offense for selling liquor without a license that the wine should be intoxicating. (*Schwab* v. *People*, 4 Hun, 520.)

## SECTION V.

### Actions on Bonds.

The statutes, sections 18 and 23, provide for the taking of bonds from innkeepers and store-keepers procuring licenses, and section 45 adds vendors of ale and beer to the above. The penalties and conditions of said bonds are stated in the above sections. It is made the duty of several different officers to attend to the breach of the conditions of such bonds. (Section 35.) They cannot sue in their own names alone, but the action should be brought as follows: "The People of the State of New York, on the relation of John Doe, Supervisor of the town of Knox, against Richard Roe." Or it may be brought in the name of the people only, and as this has been recognized by the general term as a correct way it may be well to follow the precedent. (*People* v. *Groat*, 22 Hun, 164.)

The above was an action upon a bond for keeping a gaming table, to wit: a billiard table, by a hotel keeper, which has been declared to be a breach of the condition of the bond. It was there held that the bond might be recovered upon, although it had no seal. The overseers of the poor cannot bring an action on a hotel or store-keeper's bond. (Id.)

Previous to the Code of Civil Procedure this action could have been brought by any attorney employed by either of the parties mentioned in section 35; but by section 1962 of the Code of Civil Procedure a penalty incurred to the people of the State, or to an officer for their use, pursuant to a provision of law, the attorney-general or the district attorney of the county in which the action is triable must bring the action to recover the penalty.

There is no provision in section 35, however, declaring to whom the penalty recovered upon a forfeited bond shall be paid, while section 1963 of the Code of Civil Procedure declares that where the recovery is not otherwise specially granted or appropriated by law, it must, when collected, be paid into the treasury of the State. If to the people of the State, or to any officer for their use, then the district attorney or the attorney-general should bring the action; but if the penalty is to be paid over for the use of the poor of the town or county—as are the other penalties under the excise law—or to the parties bringing the action and recovering the penalty (section 35), then it is not to the people of the State or to an officer for their use, when the action may be brought and conducted as before the Code of Civil Procedure.

The case of *The People* v. *Groat* (22 Hun, 164), was held to be properly brought, but the court in that case did not expressly declare who should receive the money when recovered. The court there declared that there are no *cestuis que trusts* for whom the people can be said to hold such a bond. It is, therefore, until the Court of Appeals shall pass upon this question, uncertain what course to direct, other than to apply to the attorney-general for permission to bring such an action, and get the force of his opinion in that manner before venturing upon an untried field.

In this, as in all actions for penalties, if the complaint is not served with the summons, a general reference to the statute must be indorsed upon the copy of the summons delivered to the defendant, as follows: "According to the provisions, etc." (See section 1897, Code Civil Procedure.)

As to what is a disorderly house, see *Gardner* v. *Bain* (5 Lans., 256.)

The bond is broken when the hotel proprietor keeps a

billiard table for use in his inn, when the rule is, that the winning party in the game is to pay the proprietor for the use of the table. The same rule would apply where the landlord keeps dice for his customers to throw for drinks or cigars, the loser to pay for both. There can be no difference in the rule. (See notes at end of *People* v. *Sergeant*, 8 Cow., 141.) The extreme rigor of the rule will be found enforced in *People* v. *Cutler* (28 Hun, 465).

"The defendant kept a public saloon to which persons resorted for the purpose of playing pool and bagatelle. In some cases the losers were, by the terms of the game, to pay for the use of the apparatus, and in others for the drinks. Held, that the house was a public nuisance at common law, and that persons who resorted to it were gamesters within the meaning of subdivisions 4 and 7 of section 899 of the Code of Criminal Procedure. (Id.; also, see *Tanner* v. *Trustees of Albion*, 5 Hill, 121.)

The playing of games for beer or cigars is gambling within the meaning of chapter 504 of the Laws of 1851. (*Hitchins* v. *People*, 39 N. Y., 454.) It is sufficient, to establish guilt, to prove that the defendant, occasionally, knowingly permitted gambling in his office. It is not necessary to prove that he habitually did so. (Id.)

The substance of the act of 1851 has been re-enacted in the Penal Code, sections 343 and 344, so that any of the usual methods adopted in many hotels to decide who shall pay for drinks, cigars or games, which go to the proprietor, are gambling, and break the conditions of the bond.

The Code of Criminal Procedure defines who are disorderly persons, and subdivisions 4, 7 and 8 of section 899, are specially applicable in this connection. Subdivision 4 reads: "Keepers of bawdy houses, or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals or other disorderly persons." Subdivision 7. "Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming therewith." Subdivision 8. "Persons who play, in a public highway or place, with cards, dice or other apparatus or device for gaming," are disorderly persons.

The statute in relation to a hotel bond, in the light of these provisions and authorities, will be easily understood. To harbor disorderly persons, is allowing the hotel to be disorderly. It will, therefore, be seen that many of the lower order of hotels are disorderly within the meaning of the statute, and all that is required to compel a proper compliance with the terms of the bond in such cases, is a diligent effort on the part of the better class of hotel keepers, as well as the officers of the town, whose duty it is to prosecute the bond. Yet, with all the power of the State to assist, without a public sentiment to go hand in hand with the law, it will be useless to undertake the task.

If such bonds fall within section 1962 of the Code, as has been intimated, then whenever the local authorities, to whom is given the power to prosecute, shall be presented with proper proof, or become otherwise satisfied that a breach of such bond has taken place, it will be their duty to present such proof to the district attorney of the county, or the attorney-general of the State, and request him to prosecute the bond and recover the penalty, and it will be the duty of such officer to commence the prosecution. In practice, the attorney of the local authorities will be allowed to conduct the prosecution, using the name of the district attorney or the attorney-general as attorney, and in no other way will they be connected with the case after it is once commenced.

It is no defense to an action on a bond that it is not under seal. (*People* v. *Groat*, 22 Hun, 164.)

## SECTION VI.

### Indictments.

It is seldom since the enactment of section 56 of the Code of Criminal Procedure, that an indictment will be had for any offense under the excise law of this State. The only method of doing so is by section 57 of that Code. This is a proceeding to be taken only by the accused, he being under the necessity of procuring a certificate from the county judge, or a justice of the supreme court, that it is reasonable that the charge against him be presented by in-

dictment, etc. It is not a privilege, on his part, to be so proceeded against, but he must convince the judge to whom he makes application, that it is proper to have his case take a different course than that provided for such offenser generally. But as it is possible that some case may be so tried, a few authorities on the subject of indictments may be necessary.

Defects in form are to be disregarded which do not prejudice the substantial rights of the defendant upon the merits. (Section 285, Code Criminal Procedure.) As to the practice previous to the Criminal Code, see *People* v. *Adams* (17 Wend., 475). An indictment for selling without a license will not be upheld by proof that a store keeper sold liquor to be drank on the premises. (*Huffstater* v. *People*, 5 Hun, 23; *People* v. *Buffium*, 27 id., 216.)

The exact crime should be charged. In above cases the allegations should have been that defendant sold by measure, to be drank on the premises, which is made an offense distinct from that of selling without a license.

An indictment is sufficient in form if it contain the title to the action, specifying the court to which the indictment is presented, and the names of the parties, and a plain concise statement of the act constituting the crime without unnecessary repetition. (Section 275, Code Criminal Procedure.)

A servant is protected by his master's license to the same extent as his master would be. (*People* v. *Buffum*, 27 Hun, 216.) Defendant was indicted for selling without a license; he was the agent of a licensee under a store-keeper's license, and sold to be drank on the premises. Held, not guilty. (Id.)

One Ross was convicted for selling liquor to a minor under fourteen years, under section 26. "The minor, a boy ten years old, testified that he was sent to purchase the liquor by an adult, one Martin, who lived in the house with him, and who furnished the money to buy it; that he brought the liquor to Martin without tasting it; that subsequently Martin gave him a drink, by reason of which he became intoxicated. Held, that the conviction was proper, and that the fact that the boy was acting as agent for an

undisclosed principal did not release Ross from the penalty imposed by statute." (*Ross* v. *People*, 17 Hun, 591.)

The omission in an indictment, for selling liquor at retail to be drank on the premises without having an innkeeper's license, to refer to the exception in the act of 1869, will not render it void. If the accused can bring himself within the exception he should do so by proof. (*Jefferson* v. *People*, 15 N. Y. Weekly Dig., 542.) In an indictment for selling liquor without a license, it is sufficient to allege that the liquor was sold in the Ninth ward, without stating the street or number. (*Schwab* v. *People*, 4 Hun, 520.)

An indictment for selling liquor charged that it was sold on Sunday, the thirteenth day of October; the proof was not Sunday, but Monday; the variance was held immaterial. (*People* v. *Ball*, 42 Barb., 324.) It is no defense to an indictment that a penalty has been sued for and recovered for the same offense. (*People* v. *Stevens*, 13 Wend., 341; *Blatchley* v. *Moser*, 15 id., 215.)

## SECTION VII.

### Ale and Beer.

It was for several years a vexed question whether ale and strong beer were "strong and spirituous liquors." At last the matter came before the senate of the State as a court of errors, and the subject received an exhaustive review by Chancellor Walworth, and were it his only decision it would have marked him as a man of great ability and much erudition. The action was brought in justice court for selling liquor without a license, and the question came squarely before the court as to whether ale, porter and strong beer were within the statute. The law provided then, as now, against selling "strong or spirituous liquors or wines" without a license. The chancellor reviewed the whole history of "strong drink," as mentioned in the Scripture, as well as the products of the still, tracing it back to the earliest times, and says the act of making it was ascribed to *Osiris*, the god of the early Egyptians, corresponding to the Bacchus of the Romans. Indeed, as a matter of quaint and ancient lore, it will be interesting reading to all. He finally

came to the conclusion that if the human stomach could contain enough of the mixture called ale and strong beer to intoxicate it was within the statute, and they were included in the terms "strong and spirituous liquors." But as there were other liquids, sometimes called strong or fermented beer, not within the statute, that an admission by defendant that he had sold strong or fermented beer did not prove him guilty of an offense. (*Nevin* v. *Ladue*, 3 Den., 437.) This doctrine has been followed and adhered to since the act of 1857. (*Board of Commissioners of Excise* v. *Freeoff*, 17 How., 442; *Excise Commissioners* v. *Taylor*, 19 id., 259.)

In the latter case the court remarked, "Now that ale, strong beer, porter and most of the fermented drinks known in this country, and which are sold at public houses and groceries by the drink, can and do produce intoxication to a greater or less extent, and that such is the ordinary effect of their use as a beverage no man of mature years, who is not strangely oblivious to surrounding and passing events, can have failed to observe. (Id., 265.) The Court of Appeals following the same line of argument held any liquor is within the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication. (*Board of Commissioners of Excise* v. *Taylor*, 21 N. Y., 173.)

In 63 New York the question again arose, and the court held that if it was shown that the defendant sold lager beer, and evidence was given tending to show that lager beer was intoxicating, and the jury believed it, they should convict. (*Rau* v. *People*, 63 N. Y., 277.) And as to lager beer it has been held to be a question of fact generally. (*Taylor* v. *People*, 6 Park. Cr., 355; *In the Matter of the People* v. *Hart*, 24 How., 289; 3 Park Cr., 174.) Judge Earl remarked, in the case of *Rau* v. *People*, that the courts have not been willing to take notice that lager beer was intoxicating, but have submitted the question when controverted to the jury. (See, also, *Dillman* v. *People*, 4 N. Y. Week. Dig., 251.) The method of submitting the question to the jury was discussed in the case of *The People* v. *Schewe* (29 Hun, 122).

## SECTION VIII.

### Constitutionality of Excise Laws.

The legislature of the State has the constitutional right to regulate and control the traffic in intoxicating liquors. Licenses are permits, not property. Regulations to prevent abuse violate no constitutional restrictions. (*Met. Board of Excise* v. *Barrie*, 34 N. Y., 657; *People* v. *Quant*, 12 How., 83; *Bertholf* v. *O'Reiley*, 74 N. Y., 509; *People ex rel. Pressmeyer* v. *Commissioners of Police*, 59 id., 92.)

It is not unconstitutional for villages to submit the question of license or no license to the electors; nor for the legislature to pass ennabling acts. (*Village of Gloversville* v. *Howell*, 70 N. Y., 287.)

Section 23, wherein it declares that whenever any person is seen to drink in such shop or house, out-house, yard or garden belonging thereto any spirituous liquors, etc., that it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein, is unconstitutional, as depriving the accused of his rights to a trial by jury. (*People* v. *Lyon*, 27 Hun, 180, citing *Bertholf* v. *O'Reiley*, 74 N. Y., 509; *Hand* v. *Ballou*, 12 id., 543; *Wynehamer* v. *People*, 13 id., 444.)

## SECTION IX.

### Intoxication.

The question frequently arises, under the excise law, whether a person is intoxicated or not. Innkeepers and others are liable to a penalty for selling to all intoxicated persons, and it is made an offense to be intoxicated in a public place, so it is a nice distinction which officers, magistrates and innkeepers are directed to draw. What a physician might, and many times does, fail in knowing, persons who sell or give away liquor are bound to know under a penalty. The same nice distinction must be exercised in the obedience of other sections of the excise law—such as who are habitual drunkards?

In the case of *McGinley* v. *U. S. Life Ins. Co.* (8 Daly, 394), this question is reviewed. It is there stated, "The

principles involved in the question as to whether the habits of life of a person are temperate or not, are questions of extreme delicacy and oftentimes of great importance. It, perhaps, cannot be claimed that the mere use of alcoholic stimulants constitutes intemperance; nor is there any fixed rule or standard of such general application that we can plainly discern where temperance ends and inebriety begins. Necessarily then each case of this character must be determined upon its own particular facts. Slight indulgence may produce drunkenness in A., while repeated indulgences fail to effect B. It would thus appear that the test between sobriety and inebriety is the effect produced on each individual by the use of alcoholic liquors. It is a question for a jury."

It is a question for a jury in an action for an injury by falling through a sidewalk whether the intoxication contributed to the injury. (*Healy* v. *Mayor of New York*, 3 Hun, 708.)

An habitual drunkard is not incompetent to execute a deed; he is simply incompetent, upon proof that, at the time, his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind. (*Van Wyck* v. *Brasher et al.*, 81 N. Y., 260.)

*Its Effect in Crime.*—In the case of the *People* v. *Cavanaugh* (62 How., 195), Mr. Justice Osborn charged the jury as follows: "Intoxication is no defense to a crime. If the prisoner, when he committed the act, was in such a state of mind as not to know the character of the act he was doing, or not to know the difference between right and wrong, then he would not be responsible for his act."

In the case of *People* v. *O'Connell*, 62 How., 436, it was held, "drunkenness in itself, simple drunkenness, whether it is of limited measure or whether it is an exception, does not constitute insanity, and does not excuse a person committing an act from the responsibility of the act, but if a person committing an act or doing an injury is in a state of "delirium tremems" at the time, and is therefore rendered unable to determine the nature or the quality of the act, or its right or its wrong, then he is relieved from the responsibility.

Drunkenness, although carried to the extent that it overcomes the will, and incapacitates from controlling the action of the mind, is no excuse for a crime; and voluntary intoxication, although amounting to a frenzy, does not exempt one who commits a homicide without provocation, from the same construction of his conduct, and the same legal inferences upon the question of intent, as affecting the grade of his crime, which are applicable to a person entirely sober. (*Flanigan* v. *People*, 86 N. Y., 554.)

## SECTION X.

### Hotels and their Keepers.

Hotels, inns and taverns are synonymous terms. (*People* v. *Jones*, 54 Barb., 311; *Overseers of the Poor of Crown Point* v. *Warner*, 3 Hill, 150.) As to what is an inn, tavern or hotel, see chapter 5 of this work.

As to what a licensed hotel keeper should keep to comply with the excise law, see section 19, chapter 1.

A hotel keeper cannot assign his license so as to allow any other person to keep hotel and sell liquors in his place and stead. A sale and delivery of his hotel, or an assignment of his lease, would terminate his rights under his license.

The subject of his liability under the "civil damage law" is pointed out in another part of this work.

There is, however, another statute which may entail liability upon hotel keepers as such. By chapter 583 of the Laws of 1873, it is enacted, in substance, that whenever the lessee or occupant or other owner of any building or premises shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease, etc., shall become void, and the landlord may re-enter, etc., in the same manner as a tenant holding over after the expiration of his lease.

By the second section of said act, any owner or lessee allowing his premises to be used for such illegal trade, etc., becomes jointly and severally liable with the tenants for any damage resulting from such illegal occupancy.

Under this statute selling liquor without a license is an illegal trade or traffic, and the owner or lessor, who has

rented his property for legitimate purposes, may remove his tenant or lessee summarily, for such use, and where the property has been sub let and the sub tenant uses the property in that manner, the landlord may proceed directly against the sub lessee. (*People ex rel. Jay* v. *Bennett*, 14 Hun, 63.)

He who knowingly assists a wife in the violation of her duty, is guilty of a wrong for which an action will lie. This was held to be so, where a druggist had secretly sold laudanum to the wife of plaintiff until it greatly injured her. It was also held, that the sale of liquor under like circumstances to a wife, by which the husband suffers loss, would make the vendor liable. (*Hoard* v. *Peck*, 56 Barb., 205.)

## SECTION XI.

### Practice.

A summons issued upon a suit for a penalty, should have indorsed upon it a reference to the statute under which the action is brought, but a substantial compliance will answer. A summons was issued, and indorsed, "issued according to the *proceedings* of title 9, chapter 20, part first of the Revised Statutes," and it was held a sufficient compliance with the statute. (*Andrews* v. *Harrington*, 19 Barb., 343; *Perry* v. *Tynen*, 22 Barb., 137.) If the complaint is served with the summons no such indorsement is required.

The decision of a board of excise on examination under section 49, is not reviewable on *certiorari*, when the proceedings have all been legal. (*People ex rel. Funke* v. *Board of Excise*, 24 Hun, 195. See, however, *People ex rel., etc.*, v. *Supervisors*, 51 N. Y., 442.)

As to what is a sufficient complaint in justice court for a penalty under the excise law, see *Hall* v. *McKechnie* (22 Barb., 244).

Liberality in pleadings and proceedings, where no substantial right is jeopardized or destroyed, prevail the same in excise proceedings as in other practice. Even in criminal actions, it is unnecessary to prove the precise day of the offense, and in entering up the conviction it is proper to in-

sert the day charged in the complaint, although no day was proven. (*Tiffany* v. *Driggs*, 13 John., 253.)

In bringing actions for penalties for violations, the proceedings are the same as in all civil actions, except the indorsement upon the summons. The complaint need be in no particular form, except it must comply with section 2936 of the Code of Civil Procedure. It must state in a plain and direct manner the facts constituting the cause of action.

The answer may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof. It may also set forth, in a plain and direct manner, new matter constituting one or more defenses. (Section 2938, Code Civil Procedure.)

Actions for penalties being of a *quasi* criminal nature, and not arising out of contract express or implied, any judgment obtained for a penalty or for costs, will entitle the prevailing party to an execution against the body in like manner as for frauds, torts or wrongs, and the defendant will not be entitled to jail liberties. (Section 43, chapter 1; *People ex rel. Brown* v. *Van Hoesen*, 62 How., 76.)

Under section 28, an officer seeing an offense committed is directed to arrest the offender, without a warrant. If he neglect for ever so short a time by going away and returning he cannot arrest without a warrant. The shortness of time does not affect the merits, and for such an arrest without a warrant the officer is liable for false imprisonment. (*Myers* v. *Clark*, 41 N. Y. Sup'r Ct. Rep., 107.)

## SECTION XII.

### Miscellaneous Provisions.

There are various other questions that have relation to the excise laws that have been before the courts of this State. Many of the decisions not hereinbefore cited relate specially to cities, city ordinances or charters, construction of statutes. etc. Some of them will be cited at the close of this section; but particular subjects upon which they treat will not be given except in a general way.

An ordinance passed by a municipal corporation prohibiting the sale of spirituous liquors on Sunday, is void, as pro-

hibiting innkeepers from selling liquors to their lodgers and lawful travelers pursuant to their licenses. (*Wood* v. *City of Brooklyn*, 14 Barb., 425.) Such ordinances may be enforced when they do not conflict with general laws. (*City of Cohoes* v. *Moran*, 25 How., 385.)

A municipal government may pass ordinances imposing new and superadded penalties. Every sale necessitates an offer of the goods sold, and one single act of selling cannot be divided into two offenses. (*City of Brooklyn* v. *Toynbee*, 31 Barb., 282.)

City and village charters may provide for submitting the question of license or no license to the people of the district, and where their charter is adopted after the law of 1857, and it contains a provision that actions for penalties shall be brought in the corporate name, the case is taken out of the general law and is not affected by the amendment of 1873, vesting the power to prosecute in the overseers of the poor. Nor is it disturbed by chapter 444 of the Laws of 1874. (*Village of Gloversville* v. *Howell*, 70 N. Y., 287.) The provisions in the charter and the right to submit to vote were held to be constitutional. The act of 1874 abolished boards of commissioners of excise in villages. (Id., 293.) The same rule was held in substance in the case of *People ex rel. Stiner* v. *Morrison* (78 N. Y., 84).

The provisions of the charter of the village of Deposit, which provides for the payment of all sums received for licenses into the treasury of the village, is not repealed by chapter 444 of the Laws of 1874 creating boards of excise for the several counties of the State. (*Village of Deposit* v. *Devereux*, 8 Hun, 317.)

For effect of general upon special statutes, see *People ex rel. Stiner* v. *Morrison* (78 N. Y., 84), *Smith* v. *People* (47 id., 330), *People* v. *Gates* (56 id., 387), *Village of Deposit* v. *Devereux* (8 Hun, 317).

As to the repeal of special statutes, see *The People* v. *Quigg* (59 N. Y., 83), *Matter of Commissioners of Central Park* (50 id., 493).

The courts should be astute to find out some meaning to every statute, and if an intent can be spelled out fairly from the words effect should be given to that intent, though not

artistically expressed. (*Matter of Commissioner of Washington Park, Albany*, 52 N. Y., 131.)

The attorney-general has written opinions upon various questions presented to him by inquiries, and although not binding upon the courts they may throw some additional light upon the questions that have or may hereafter arise. They are referred to according to number and may be examined by the student or any party interested. It is not thought best to more than refer to them here. Number 418, 427, 452, 456, 457, 458, 460, 461, 465, 469, 503, 514, 527, 537, 553, 568.

Decisions having special application to cities and villages: 18 N. Y., 38; 28 id., 605; 78 id., 84; 8 Hun, 317; 21 How., 117; 31 Barb., 142; 23 N. Y., 439; 63 id., 623; 7 Hun, 345; 11 id., 289; 23 id., 66; 6 Lans., 251; 1 Keyes, 454; 26 N. Y., 467; 70 id., 287; 5 Hun, 310; 21 id., 244; 25 How., 385; 23 Wend., 459; 2 Keyes, 132.

# CHAPTER IV.

## THE CIVIL DAMAGE ACT.

### SECTION I.

#### General Provisions of the Statute.

The legislature, by chapter 646 of the Laws of 1873, passed what is known and called "the civil damage act" (*ante*, chapter 1, sections 69 and 70), and which has been decided to be a part of the excise laws of the State. (*Franklin* v. *Schermerhorn*, 8 Hun, 112; *Baker* v. *Pope*, 2 id., 556.) By the said act every husband, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action against the person selling the liquor producing the intoxication, in whole or in part, or against the owner of the premises renting the same or having knowledge that intoxicating liquors are to be sold therein, for the damages sustained, and also for exemplary damages, and the action may be joint or several against the seller and the owner of the premises.

*Previous Statutes.*—The only provisions previous to the passage of this act, by which damages might be recovered against the person selling liquor, were by section 1, 3 Revised Statutes (6th ed.), page 732, which gave a right of action to the person injured, or after his death by his representatives, against a wrong-doer for wrongs done to the property, rights or interests of the person injured (*ante*, section 71); and by section 28, chapter 628, 1857 (*ante*, section 39), which contains the germ of "the civil damage

act," and by which the sale of strong or spirituous liquors to persons to whom it is declared by said act unlawful to make such sale, rendered the person selling liable to the person sustaining injuries thereby, for the damages sustained, the sum recovered to be for the benefit of the party injured. And under said sections it was held in the case of *Kilburn* v. *Coe* (48 How., 144), that, damages arising from injuries to property, sustained by an habitual drunkard, may be recovered under the excise law against any person unlawfully making the sale of the liquor, by the means of which the injuries arose. Such injury to the habitual drunkard being against his property or estate, as distinguished from a mere injury to his person, an action for damages may be brought, in case of his decease, in favor of the executors or administrators of his estate.

The justice writing the opinion in the above case, states, in substance, that the purchaser, in consequence of the sale, is injured by the unlawful sale to the amount of the price paid, and may maintain an action for the same, and that "the legislature certainly designed to go so far by the enactment of the section (section 39, *ante*) as to apply that to the case of a person unlawfully obtaining another's money, by the sale of strong or spirituous liquors."

Section 19 of the act of 1857 (*ante*, section 30), also gives a penalty of fifty dollars after notice in certain cases, but it will be observed that this is a penalty, and not for damages resulting from the sale of intoxicating liquors.

Cases might arise where an action could not be maintained under the "civil damage act," when it might be important to rely upon the foregoing statutes.

## SECTION II.

### A New Cause of Action Created.

By the enactment of the "civil damage act," a new cause of action was created, and both direct or consequential injuries are included in the remedy given. (*Volens* v. *Owen et al.*, 74 N. Y., 526.) The words "means of support," in connection with the designation of the persons in whose favor the remedy is given, viz., husband, wife, child, parent, etc., denote that it was not alone a common-law injury, or

an injury before remediable by action, to which the statute was intended to apply. (Id.)

It will be noticed that some person must be "injured in person or property or means of support" to give a cause of action, and it is not necessary that the person injured be the husband, wife, child, etc., of the person doing the injury, but if the injury is done by any intoxicated person, or in consequence of the intoxication of any person, the persons named shall have the right of action for the same, and such action may be not only against the person selling, who is very often unable to respond in damages, but against the owner of the premises renting or permitting them to be used for the sale of intoxicating liquors, or against them jointly; and, as heretofore shown, the term, "intoxicating liquors," as used in the statute, means "strong or spirituous liquors;" therefore the act applies to the sale of all liquors that are intoxicating, and must include ale, wine and beer, as they are held to be intoxicating.

This is a just and equitable statute, and the persons intended to benefited, are those most liable to need the assistance for which it provides.

It will also be seen by reference to the statute, that the unlawful sale or giving away of intoxicating liquors, works a forfeiture of the rights of the tenant or lessee under his lease.

## SECTION III.

### Jurisdiction of Justices of the Peace.

By the second section of the "civil damage act," any justice of the peace of the county where the offense is committed, has jurisdiction of the action, where the claim does not exceed $200, and by associating with himself two other justices of the county, has jurisdiction to the amount of $500, as the damages sustained under the statute would, in a great majority of cases, be under the sum of $500, this section provides for an expeditious and comparatively inexpensive trial, in case the party bringing the action should choose to bring it in a justice's court.

## SECTION IV.

### Constitutionality of the Act.

The act of 1873, known as "the civil damage act," was constitutional and valid. (*Bertholf* v. *O'Reiley*, 74 N. Y., 509; *Met. Board of Excise* v. *Berrie*, 34 id., 657; *Baker* v. *Pope*, 2 Hun, 556; S. C., 5 T. & C., 102; *Hayes* v. *Phelan*, 4 Hun, 733; *Dubois* v. *Miller*, 5 id., 332; *Jackson* v. *Brookins*, id., 530; *Franklin* v. *Schermerhorn*, 8 id., 112; *Smith* v. *Reynolds*, id., 128; *Mead* v. *Stratton*, id., 148.)

The legislature has power to create a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon. (*Bertholf* v. *O'Reiley*, *supra*.) The court in the opinion say, "That the act is doubtless an extreme exercise of legislative power; but we cannot say that it violates any express or implied prohibition of the constitution."

The liability may be imposed irrespective of the question whether the sale or giving away of the liquor was lawful or unlawful, or of the question of negligence on the part of the landlord or tenant. (Id.)

It may be well to go further upon this point, and quote from the opinion (page 513), "The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful; that is, whether it was authorized by the license law of the State, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom liquor is sold is at the time apparently a man of sober habits and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under

the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability."

## SECTION V.

### When Cause of Action will not Exist Under.

There are cases where the action will not lie, which would seem at first look to come fairly within the statute. In the case of *March* v. *Mabbitt* (3 Week. Dig,, 126), there was no evidence on the trial of any specific act done, or omitted by the husband, while in a state of intoxication which in any manner injured the plaintiff in person or estate, or deprived her of any means of support, and she failed to recover.

In one case the complaint alleged that the death of plaintiff's husband was caused by intoxication, caused by liquors sold to him by defendant, and that by his death plaintiff had sustained damages in being deprived of the companionship of her husband, and of the customary support and maintenance of herself and children. And it was held that the complaint did not state a cause of action under the statute. (*Hayes* v. *Phelan*, 4 Hun, 733.) And among the reasons given by the learned judge writing the opinion were, that no injury by an intoxicated person is alleged, that deprivation of companionship is not by the statute a ground of action, no previous loss of means of support is alleged, and says, in substance, that a right of action exists against the vendor or giver of the liquor only in cases where it lies against the intoxicated person. Judge James wrote a dissenting opinion in this case (5 Hun, 530), in which he arrives at a different result, as did the court in *Quain* v. *Russell* (8 Hun, 319); and see *Mead* v. *Stratton* (87 N. Y., 498). In the last two cases, it was held that it was not essential to the cause of action; that a cause of action should also be maintainable against the intoxicated person; that it was sufficient if the wife had been injured in her means of support through the intoxication of her husband.

In another case the complaint alleged that the defendant

sold intoxicating liquors to plaintiff's husband, intoxicating him, and rendering him incapable of labor and of supporting the plaintiff, and so injuring him as to cause his death, and that, by reason of his death, plaintiff had been injured in property and means of support to the amount of $5,000, and it was held not to state a cause of action under the "civil damage act." (*Brookmire* v. *Monaghan*, 15 Hun, 16.)

The primary purpose of the legislature, in giving a right of action for an injury of this character, was the protection of the dependant and helpless. Diminution of income, or loss of property, does not constitute an injury to means of support, within the fair intendment of the statute, if the plaintiff, notwithstanding, has adequate means of maintenance from accumulated capital or property, or his remaining income is sufficient for his support. (*Volans* v. *Owen et al.*, 74 N. Y., 530.)

The above action was brought for loss of services of plaintiff's minor son and for medical and other expenses, and it was held that the plaintiff was not entitled to recover, in the absence of proof that said services were necessary to his support, or that the charge brought upon him diminished his means so as to render them inadequate therefor. (Reversing same case, 9 Hun, 558.)

## SECTION VI.

### Joint Action Against Separate Vendors will not Lie.

A joint action will not lie against two or more persons who, separately, at different times and at different places, have sold liquor to the same person, each quantity of liquor sold having contributed to produce the intoxication that caused the injury. (*Jackson* v. *Brookins et al.*, 5 Hun, 530.)

The above action was brought jointly against two separate vendors of liquor, and the landlord of one of them, charging that each sold liquor to plaintiff's husband, and to other parties on the same day, but at different places, the liquor sold by each contributing to produce the intoxication of the parties, who afterward engaged in an affray and plaintiff's husband was killed. The defendants each demurred, one ground of demurrer being that the defendants could not be

sued jointly. The demurrer was sustained upon this point, the court holding that a cause of action was stated against the one vendor, and another stated against the other vendor and his landlord jointly; but that a joint action would not lie against the three persons. And further, "That whether more than one action will lie in favor of plaintiff, we are not called upon to decide." It is to be regretted that the court did not give an opinion upon this point, as many, if not a majority, of the cases that might arise under the statute are similar to this one, the persons becoming intoxicated by liquor procured at several places. Certainly, by the terms of the act, each of the parties are liable for the damages sustained, having sold or given away the liquor that produced the intoxication "in whole or in part," and under the last case cited the whole damages could be recovered of any one vendor, but could they each be made to respond? It would seem that the injury having been fully satisfied by the recovery of the damages against one of the vendors, another action brought against another vendor would be barred.

In the case of *Morenus* v. *Crawford* (15 Hun, 45), the liquor producing intoxication was sold by two persons at different places; the action was joint against them, and the complaint charged a conspiracy between the vendors. It was held that two separate sales by the defendants severally, did not uphold the allegation of a joint sale by defendants, and the allegation of a conspiracy was treated as surplusage, but the question as to whether a separate action and recovery would lie against each was left undecided. These words, however, were used in the prevaling opinion, "possibly the plaintiff might have been allowed to elect, and to recover against one or the other of the defendants, but we need not decide that."

## SECTION VII.

### Where Several are Injured, They can Only Recover Proportionately.

The statute gives the right of action to several persons. In case of the death of the husband and father, the wife is not the only party injured, but the children are also injured

in their "means of support," where they are dependant upon the father; and the same questions would arise as in the case of several parties selling the liquor producing intoxication. In case the wife elects to sue for the damages and recovers, is an action by the children barred, or can each maintain an action for the damages sustained by each, or must they all join in one action for the whole damages? In the case of *Franklin* v. *Schermerhorn et al.* (3 N. Y. Week. Dig., 390; S. C., 8 Hun, 112), it was held that where several persons are dependant for support upon the person to whom the liquor was sold, by means of which the injury was sustained, in an action by one of such persons against the person who sold the liquor, the plaintiff's proportionate share only could be recovered.

In the last case the intoxicated person had a wife and four children dependant upon him; the wife brought an action recovering $175. It was held, Justice E. D. Smith writing the opinion, that as the act gives a right of action to husband, wife, child, etc., or other person who shall be injured, that the wife was entitled to her proportionate share only, or one-fifth of the loss. It also declares the act vague and inexplicit, and that while the legislature doubtless intended to give a single right of action, and single damages to one person, a right of action is given, or might arise, to a husband or wife and each of their children, be they ever so many, as well as to the other persons named in said section.

If the decision in this case is correct, it would be necessary for each to bring a separate action, thereby making, as it would seem, much unnecessary litigation, or a joint action be brought by all; but the right to maintain a joint action in such case would be somewhat doubtful, as each is given a cause of action, and there is not that community of interest which would allow them all to unite in one action. A guardian might be appointed for the children, and their interest assigned to the mother, when damages could all be recovered in one action, but this course would call for delay in getting the appointment of a guardian, as well as trouble and expense, which, in many instances, where the injury is slight, would deter the parties from proceeding with the matter.

## SECTION VIII.

### When Cause of Action Exists Under for Loss of Means of Support.

Where the death of a man is a result necessarily following, and attributable to his intoxication, an action is maintainable by his widow, if injured in her "means of support," against the vendor of the liquor causing the intoxication, and the owner of the building where the liquor was sold, in the cases specified in the civil damage act. (*Mead* v. *Stratton*, 87 N. Y., 493; *Hill* v. *Berry*, 75 id., 229; *Quain* v. *Russell*, 8 Hun, 319; *Jackson* v. *Brookins*, 5 id., 530; *Davis* v. *Standish*, 26 id., 608 )

It will be observed from a reading of the cases, as well as the statute, that the person seeking to recover must be injured in "means of support, etc." No matter how great the injury may be in other respects, or how much suffering may be entailed by reason of the intoxication, if the person is not injured in person or property or means of support no action will lie. Death of the husband alone does not give a cause of action. (*Brookmire* v. *Monaghan*, 15 Hun, 16.)

In the case of *Mead* v. *Stratton* (*supra*), the court say, "If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof, furnishes much stronger ground for a claim for a loss of means of support." In the case of *Davis* v. *Standish*, it was held that the jury in estimating the damages might consider the expectancy of the plaintiff and her deceased husband, based upon the Northampton tables. And, also, that if the liquor was the proximate cause of death it justified a verdict for the plaintiff.

The case of a husband, having a wife and family dependent upon him for support, who by reason of intoxication becomes incapacitated to labor and neglects to provide for those so dependent, or squanders his substance, reducing them to penury and want, is within the act. (*Volans* v. *Owen et al.*, 74 N. Y., 527.)

## SECTION IX.

### Injury to Person or Property.

Injuries arising to the person or property from or by reason of the intoxication of another come within the statute.

Where a wife is thrown out of a wagon and seriously injured, through the recklessness of a drunken driver, the husband is entitled to recover damages for the loss of her services, and for medical attendance on her, from the liquor dealers who sold the driver the liquor whereby he became intoxicated. (*Aldrich* v. *Sager*, 4 Week. Dig., 111; S. C., 9 Hun, 537.) Here the injury was produced by the driver, a third person, and the husband of the person injured recovers of the person selling the liquor to the driver.

R. was the owner and F. the keeper of a place where intoxicating liquors were sold without a license. The son of the plaintiff on a Sunday took plaintiff's horse, saying he was going to see a friend about four miles distant, but instead went directly to the place of F. and became intoxicated there, and when in such state drove the horse so violently that he died; and it was held that an action could be maintained against R. and F. jointly. (*Bertholf* v. *O'Reilly*, 8 Hun, 16.) And that the father knowing his son to be of intemperate habits, was not guilty of contributory negligence in allowing him to drive the horse; and that the sending of the horse on Sunday did not deprive the plaintiff of the right to sue for his property unlawfully destroyed. (Id.)

A wife may recover damages for injuries and pain endured, against a licensed liquor dealer selling liquor to her husband, causing his intoxication, by reason of which he upsets a wagon, throwing her to the ground. (*Relyea* v. *Norris*, 5 Week. Dig., 343; affirmed, 77 N. Y., 629.)

## SECTION X.

### Liability of Owner of the Premises.

The object of the law was to prevent the impoverishment of families by reason of intoxication; to prevent the violence and injury resulting from intoxication by making those who caused the intoxication liable for the damages which resulted to others by reason thereof. The tenant may sell, but he

must be careful to whom he sells, and never to sell enough to cause intoxication, or to add to an intoxication which had been commenced by sales of strong drink by others. The landlord must see that he rents his premises, if he rents them for the purpose of selling intoxicating drinks, to persons who will so sell that no person will be injured in person, property or means of support by reason of his sales. The legislature required the owner, who alone has the power to lease and select his tenant, to assume the risk of his tenant's acts in the business of selling spirituous liquors when such tenant caused injury by his sales. If the legislature can legislate against the tenant, its power to reach the landlord cannot be doubted in the cases mentioned in the act referred to. (*Bertholf* v. *O'Reilly*, 8 Hun, 16; S. C., 74 N. Y., 509.)

The liability of the owner may be imposed irrespective of the question whether the sale or giving away of the liquor was lawful or unlawful, or of the question of negligence on the part of the landlord or tenant, and such a legislative enactment is not violative of the constitutional provision prohibiting the taking of private property without "due process of law." (74 N. Y., *supra*; *Met. Board of Excise* v. *Barrie*, 34 N. Y., 657.)

In the case of *Mead* v. *Stratton et al.* (87 N. Y., 493), the wife of the vendor of the liquors was the owner of the premises and had taken title and possession before the passage of the act. She had general charge of the house, except of the bar, and knew that intoxicating liquors were there sold, and it was held that the fact that possession was taken before the act was passed did not exempt her from liability; that the presumption was that the possession originally taken was continued in view of the laws of the State thereafter enacted; and that the question whether she had given permission for the occupation of the building with knowledge that liquors were to be sold, was properly submitted to the jury, and that having such knowledge she was liable under the act.

A joint action may be maintained against a landlord and his tenant. (*Jackson* v. *Brookins*, 5 Hun, 530; *Bertholf* v. *O'Reilly*, 74 N. Y., 509.) But will not lie, however, against two or more persons who, separately, at different times and at different places, have sold liquor to the same person, each

quantity of liquor sold having contributed to produce the intoxication that caused the injury. (*Jackson* v. *Brookins*, *supra.*)

## SECTION XI.

### License to Sell, no Defense.

The liability imposed by the statute falls upon every person who has sold the liquor producing the intoxication—upon those who take out a license, as well as upon those who sell without a license. (*Baker* v. *Pope*, 2 Hun, 556.) The act is not inconsistent, nor in conflict with the law allowing the vendor to receive a license. It does not forbid the sale, but attaches a liability, by reason of certain consequences of the sale. It imposes upon the seller the duty of guarding his conduct, so as to produce no mischievous results. (Id.) The license to the defendant from the board of excise of the town, giving him permission to sell intoxicating liquors, did not bar the plaintiff's action. (*Quain* v. v. *Russell*, 12 Hun, 376.)

The statute, in giving a right of action, makes no distinction between the licensed and unlawful sale of liquor. (*Davis* v. *Standish*, 26 Hun, 615; *Dubois* v. *Miller*, 5 id., 334.)

## SECTION XII.

### Innocence and Good Faith no Defense.

The man who sells liquor to another, whether lawfully or unlawfully, is not protected against the provisions of the statute, because he does not, at the time he sells the liquor, contemplate that it will lead the man into circumstances where he is liable to lose his life (*Davis* v. *Standish*, 26 Hun, 612.)

The supplying to a party who is injured afterwards by reason thereof, although done by the bartender without the knowledge or authority of his employers, and against their instructions, makes the employers liable for the injuries sustained. (*Smith* v. *Reynolds et al.*, 8 Hun, 128.) The settled principle applies, that the principal is liable to third persons for the misfeasance, negligence and omissions of the agent in the business of his agency. (Id., 130.)

## SECTION XIII.

### Exemplary Damages.

The jury, in this class of cases, have the right to give exemplary damages, yet they should only be given where there are circumstances of abuse or aggravation proved on the part of the vendor of the liquor. (*Franklin* v. *Schermerhorn*, 8 Hun, 112.) They clearly should not be allowed, in ordinary cases, where nothing is proved but the simple sale of a single glass of liquor under ordinary circumstances. (Id., 115.) In the case of *Davis* v. *Standish* (26 Hun, 615), the trial court charged, that the fact that the defendant was selling liquor without a license might be considered as a basis for exemplary damages, and it was held to be no error, and that the circumstance that the defendant, in selling the liquor that produced the intoxication and the resultant injury, was acting in open defiance of law, might be considered as a basis for exemplary damages.

In *Dubois* v. *Miller* (5 Hun, 332), the question arose, as to whether exemplary damages should be given in a case where the seller of the liquor knew the purchaser to be a drunkard, but was not decided. But it seems clear that, if exemplary damages may be allowed for selling without a license for the reason that it is an act of "open defiance of law," that such damages should be given in the case of selling to a known drunkard, as that is an act in defiance of the law, and especially would this be so in a case where the seller had been notified not to sell to the drunkard. (See *Hoard* v. *Peck*, 56 Barb., 202.)

## SECTION XIV.

### Mitigation of Damages.

The license from the board of excise of the town, giving permission to sell intoxicating liquors does not bar an action. The only effect of the license is to mitigate damages, and is admissible as evidence for that purpose. (*Quain* v. *Russell*, 12 Hun, 377.) It is hard to see how the fact of the defendant's having a license can result in a mitigation of damages. The statute is plain and distinct, and the decisions unanimous upon the point, that it makes no differ-

ence whether a man is licensed or not, an action can be maintained for the damages. The statute gives exemplary damages; and we have seen, *ante*, that selling without a license is a cause for allowing exemplary damages, but how can a license under the statute be a cause for a mitigation of damages.

# CHAPTER V.

INNKEEPERS.

## SECTION I.

STATUTES RELATING TO THE RIGHTS, DUTIES AND LIABILITIES, AS WELL AS FOR THE PROTECTION OF HOTEL-KEEPERS.

1. Whenever the proprietor or proprietors of any hotel or inn shall provide a safe in the office of such hotel, or other convenient place, for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel or inn, and shall notify the guests thereof by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited) in a public and conspicuous place and manner in the office and public room, and in the public parlors of such hotel; and, if such guest shall neglect to deliver such money, jewels or ornaments to the person apparently in charge of such office for deposit in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments sustained by such guest by theft or otherwise. (Section 1, chapter 421, 1855, as amended by section 1, chapter 227 of the Laws of 1883.)

2. No hotel keeper shall be liable to any guest for the loss of wearing apparel, goods or merchandise for any sum exceeding the sum of $500, where it shall appear that such loss occurred without the fault or negligence of such hotel keeper; nor shall he be liable in any sum for the loss of any article or articles or wearing apparel, cane, umbrella, satchel, valise, box, bag, bundle or other chattel belonging

to such guest, and not within a room assigned to him, unless the same shall be specially intrusted to the care and custody of such hotel keeper or his servants. (Section 2, chapter 421, 1855, as amended by section 2, chapter 227 of the Laws of 1883.)

3. No innkeeper shall be liable for the loss or destruction by fire of property received by him from a guest, stored or being with the knowledge of such guest in a barn or other out-building, where it shall appear that such loss or destruction was the work of an incendiary, and occurred without the fault or negligence of such innkeeper. (Section 1, chapter 658, 1866.)

4. No animal belonging to a guest and destroyed by fire while on the premises of any innkeeper, shall be deemed of greater value than $300, unless an agreement shall be proved between such guest and innkeeper that a higher estimate shall be made of the same. (Section 2, id.)

5. Every person who shall, at any hotel or inn, order and receive, or cause to be furnished, any food or accommodation, with intent to defraud the owner or proprietor of such hotel or inn out of the value or price of such food or accommodation; and every person who shall obtain credit at any hotel or inn by the use of any false pretense or device, or by depositing at such hotel or inn any baggage or property of value less than the amount of such credit, or of the bill by such person incurred; and any person who, after obtaining credit or accommodation at any hotel or inn, shall abscond from such hotel or inn, and shall surreptitiously remove his baggage or property therefrom shall, upon conviction, be adjudged guilty of a misdemeanor. (Section 1, chapter 677, 1867.)

6. Every keeper of a hotel or inn shall post in a public and conspicuous place and manner in the office or public room, and in the public parlors of such hotel or inn, a printed copy of this act and a statement of the charges or rate of charges by the day and for meals furnished and for lodging. No charge or sum shall be collected or received by any such hotel keeper or innkeeper for any service not actually rendered, or for a longer time than the person so charged actually remained at such hotel or inn; nor for

a higher rate of charge for the use of such room or board, lodging or meals than is specified in the rate of charges required to be posted by the last preceding sentence; provided such guest shall have given such hotel keeper or innkeeper notice at the office of his departure. For any violation of this section, or any provisions herein contained, the offender shall forfeit to the injured party three times the amount so charged, and shall not be entitled to receive any money for meals, services or time charged. (Section 2, chapter 677, 1867, as amended by section 2, chapter 802, 1871, as amended by section 3, chapter 227 of the Laws of 1883.)

The act required by the last subdivision to be posted, consists of subdivisions 5 and 6. The act as originally passed required restaurant, boarding-house, and hotel keepers, to post the act, and also to post the same in every bed-room of the house. The act as amended applies only to hotels, and only requires posting in the office and public parlors, and also makes it necessary for the guest to give notice of his departure in order to have the benefit of the act.

7. Any hotel keeper, innkeeper, boarding-house or lodging-house keeper, who shall have a lien for fare, accommodation, or board upon any goods, baggage or other chattel property, and in his possession for a period of three months at least after the departure of the guest or boarder leaving the same, or who, for a period of six months, shall have in custody any unclaimed trunk, box, valise, package, parcel, or other chattel property whatever, may proceed to sell the same at public auction, and out of the proceeds of such sale may, in case of lien, retain the amount thereof and the expense of advertisement and sale; and, in case of unclaimed property, the expense of storage, advertisement and sale thereof; provided, in all instances, the notice specified in the next section be first given as therein directed. (Section 1, chapter 530, 1879.)

8. Fifteen days at least prior to the time of the sale a notice of the time and place of holding the sale, and containing a brief description of the goods, baggage and articles to be sold, shall be published in a newspaper of general circulation, published in the city or town in which such

hotel, inn or boarding-house is situated; but if there be none then in such newspaper published nearest said city or town; and shall also be served upon said guest, boarder or owner of such chattel articles and property, if he reside or can be found within the county where said hotel, inn, boarding-house or lodging-house is situated, by delivering the same to him personally, or leaving it at his place of residence with a person of suitable age in charge thereof. But if such guest, boarder or owner does not reside or cannot be found in said county then said notice shall be deposited in the post-office of said city or town, with the postage prepaid thereon, fifteen days prior to said sale, and addressed to said guest, boarder or owner at his place of residence, if he left his address, or it be otherwise known to said hotel, inn, boarding-house keeper or lodging-house keeper. The sale shall take place between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, and all articles sold shall be to the highest bidder for cash. (Section 2, id.)

9. Such hotel keeper, innkeeper, boarding-house keeper or lodging-house keeper shall make an entry of the articles sold, and the balance of the proceeds of the sale, if any, and within ten days from such sale shall, upon demand, refund such balance and surplus to such guest, boarder or person leaving the articles sold. (Section 3, id.)

10. In case such balance shall not be demanded and paid as specified in the last section, within said ten days, then within five days thereafter said hotel keeper, innkeeper, boarding-house keeper or lodging-house keeper shall pay said balance to the treasurer of the county, or chamberlain of said city, as the case may be, and shall at the same time file with said treasurer or chamberlain an affidavit made by him, in which shall be stated the name and place of residence, so far as they are known to him, of the guest, boarder or person whose goods, baggage or chattel articles were sold, the articles sold, and the price at which they were sold, the name and residence of the auctioneer making the sale and a copy of the notice published, and how served, whether by personal service or by mailing, and if not so served the reason thereof. (Section 4, id.)

11. Said treasurer or chamberlain shall keep said sur-

plus moneys for and credit the same to the persons named in said affidavit as said guest, boarder or person leaving the articles sold, and shall pay the same to said person, his or her executors or administrators, upon demand and evidence satisfactory to said treasurer or chamberlain furnished of their identity. (Section 5, id.)

12. Nothing herein contained shall preclude any other remedy now existing for the enforcement of hotel keepers, innkeepers, boarding-house keepers or lodging-house keepers' lien, nor bar their right to recover for so much of the debt as shall not be paid through said sale. (Section 6, id.)

13. A person who, either on his own account or as agent or officer of a corporation, carries on business as inn-keeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor. (Section 381, Penal Code.)

14. A person who obtains any food or accommodation at an inn, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, absconds and surreptitiously removes his baggage therefrom, without paying for his food and accommodation, is guilty of a misdemeanor. (Section 382, Penal Code.)

The last section was undoubtedly intended to supercede and take the place of section 5, *ante*.

15. No citizen of this State can, by reason of race, color or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations. The violation of this section is a misdemeanor, punishable by a fine of not less than fifty dollars nor more than $500. (Section 383, Penal Code.)

16. All manner of public selling or offering for sale of any property upon Sunday is prohibited, except that articles of food may be sold and supplied at any time before

ten o'clock in the morning, and except, also, that meals may be sold to be eaten on the premises where sold or served elsewhere by caterers; and prepared tobacco in places other than where spirituous or malt liquors or wines are kept or offered for sale, and fruit, confectionery, newspapers, drugs, medicines and surgical appliances may be sold in a quiet and orderly manner at any time of the day. (Section 267, Penal Code.)

17. Sabbath breaking is a misdemeanor, punishable by a fine not less than one dollar and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both. (Section 269, Penal Code.)

18. In addition to the penalty imposed by the last section, all property and commodities exposed for sale on the first day of the week, in violation of the provisions of this chapter, shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or by any police justice or magistrate, or by a mayor, recorder or alderman of a city, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseer of the poor for the use of the town or city. (Section 370, Penal Code.)

19. By chapter 143 of the Laws of 1874, any five or more persons who may desire, may form a company for building or keeping hotels, and by filing a certificate, in writing, in the office of the secretary of state, and also in the county clerk's office of the county where located, may become incorporated—the amount of capital stock not to be less than $10,000 nor more than $1,000,000.

Section 12 of said act is as follows:

"The said company shall be subject to the same liabilities as natural persons for all the purposes of this act, and shall be liable in the same manner and to the same extent as the proprietors of other hotels are liable, for loss, injury or destruction of the property of guests, except as may be otherwise provided by special written contract; but this section shall not be construed so as to make said company liable as hotel keepers in case said company shall have leased said hotel."

The balance of the act provides for the powers and general management of the corporation, and has no general interest in this work.

## SECTION II.

### Hotels and Hotel-Keepers.

An inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied, at a reasonable charge, with their meals, lodging, refreshments and such services and attention as are necessarily incident to the use of the house as a temporary home. A mere restaurant or eating-house is not an inn, nor a mere lodging-house, in which no provision is made for supplying the lodgers with meals; and, in respect to houses for the entertainment of travelers, of which there are many, where the guest or traveler pays so much a day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal, as he takes it, they are to be considered inns, if the restaurant forms part of the establishment, and the whole house is kept under one general management for the reception of all guests or travelers that may come there; it differs from a boarding-house for the reason that all who come are received, and because the guest engages for no specific period, but pays for the time he is there. (*Cromwell* v. *Stevens*, 2 Daly, 15; S. C., 3 Abbott [N. S.], 26; and see *Kopper* v. *Willis*, 9 Daly, 460.)

The above is an extract from the admirable opinion of Chief-Justice Daly, written in the case of *Cromwell* v. *Stevens*, and in which he gives a thorough history of inns, taverns and hotels, the reading of which would interest any student.

A hotel in a city kept for the entertainment of transient guests is an inn. (*Taylor* v. *Monnott*, 1 Abb., 325.) A free lunch at the bar, or the occasional bringing of victuals from a neighboring restaurant, will not transform a drinking saloon into a hotel. (*Matter of Kelley* v. *Excise Commissioners*, 54 How., 332.)

The keeper of a restaurant who has no beds for the accommodation of travelers is not an innkeeper. A mere lodging house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn. A house which does not contain the means of preparing food for the table in the ordinary way has not the necessary accommodations to entertain travelers. (Id.)

A proprietor of a house or hotel, on what is called the "European plan," *i. e.*, the renting of rooms with a restaurant for meals, is the proprietor of a hotel within the meaning of the act of 1855, chapter 421. (*Bernstein* v. *Sweeney*, 1 J. & S., 271.)

A person who makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them, their horses and attendants, is a common innkeeper. (*Overseers* v. *Warner*, 3 Hill, 157.) Hotels, inns and taverns are synonymous terms. (*People* v. *Jones*, 54 Barb., 311.)

## SECTION III.

### Rights of Innkeepers.

The right to keep an inn, in the common law sense of the term, is not a franchise; and hence, notwithstanding the excise statutes, any person may keep such a house without a license, as it is a lawful trade open to every citizen. (*Overseers* v. *Warner*, 3 Hill, 150.) Of course, it will be understood, that the right to keep a hotel does not carry with it the right to sell intoxicating liquors, unless duly licensed so to do.

The rule, as laid down in 3 Hill (*supra*), was in force until the act of 1877, chapter 419 (*ante*, page 45, section 52), by which licenses to keep hotels may be granted as other licenses are granted, but without including the right to sell strong or spirituous liquors, ale, wines, beer or alcoholic drink, for which a fee of five dollars may be charged, the same bond being required as for other licenses. It is probable that this statute has changed the common law rule of the right of every citizen to keep an inn, and that now if a hotel keeper wishes to avail himself of the statutes for his protection, he must have a license as a hotel keeper.

There are no decisions upon this question direct. In the

case of *Trimmer* v. *Hiscock* (27 Hun, 364), the action was brought by the hotel keeper for slander. The plaintiff had no license, but the answer admitted that plaintiff was the keeper of a public inn or hotel for profit, and it was held that the defendant was concluded by his answer from claiming upon the trial that the action could not be maintained because the plaintiff had failed to procure a license to keep a hotel as provided by chapter 419, 1877. It would be inferred from above that but for the admission of the answer the plaintiff would have failed, for the reason that he had no license to keep a hotel. The slanderous words complained of were, "He kept no accommodations, and a person could not get a decent meal or decent bed if he tried;" and it was held, as the words were spoken about the plaintiff's business, they were actionable, *per se*.

Under section 267 of the Penal Code (*ante*, subdivision 16, section 1), innkeepers who sell spirituous or malt liquors, or wines, have no right to sell prepared tobacco upon the premises, where he sells such liquors, on Sunday; and prepared tobacco includes cigars. For a violation he is guilty of a misdemeanor and may be punished by a fine of from one to ten dollars, or by imprisonment not exceeding five days, or both. (Subdivision 17.) And in addition the property offered for sale shall be forfeited. (Subdivision 18.)

## SECTION IV.

### Duties of Innkeepers.

Every keeper of a hotel is required by statute (*ante*, subdivision 6, section 1), to post a copy of chapter 677, 1867, as amended by chapter 227, 1883, in a conspicuous place in the office of his hotel, and also in the public parlors; and also a statement of charges for meals and lodging. Until the amendment of 1883, he was also required to post the same in every bed-room of his house. For a failure to comply with this provision, he is liable to a forfeiture, specified in subdivision 6, and is not entitled to receive payment for the meals furnished.

He is also bound by law to afford such shelter and accommodations as he possesses to all travelers who apply, and who tender, or are able and ready to pay, the customary

hire or price, if they are not drunk or disorderly or laboring under contagious or infectious disease (2 Story on Contracts, 140, § 744); and his duties are the same, no matter what the race, color or previous condition of servitude of the applicant may be. For a refusal he is guilty of a misdemeanor (*ante*, subdivisions 13 and 15, section 1); and besides he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal. (1 Wait's Law and Practice, 339.) He is not bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and to lodge therein as a guest; nor is he bound to provide his guest with the precise room which the latter may choose to select. (Id., 340.)

If he keep a safe for the safe-keeping of money, etc., of his guests, to relieve himself from liability for loss he must post notices in the office and public parlors of his house, stating that such safe is provided. (Subdivision 1, section 1.) But it has been held that personal notice that a safe is provided, is equivalent to posting the notice required. (*Purvis* v. *Coleman & Stetson*, 21 N. Y., 111.)

He is bound to exert the greatest diligence in regard to the goods and chattels of his guests. If he desire the protection given him by the law, it will be his duty to procure a license as a hotel keeper (chapter 419, 1877, *ante*, page 45, section 52), or procure a license under the general excise laws; but, in the latter case, his duties and responsibilities are increased, but will not be referred to here, having been given in a previous part of this work.

## SECTION V.

### Lien of Innkeepers.

An innkeeper has a lien upon all the property of his guest, in the inn and its stables for all his expenses. The lien does not, however, extend to the person of his guest, or the personal clothing he has on; and it only exists while the owner of the goods, in respect of which it is claimed, is actually or constructively a guest. It does not attach upon the property of a boarder. (2 Story on Contracts, 139, § 744.)

The right of lien of the keeper of an inn is settled at com-

mon law, and is based upon sound reasons. He was compelled to receive the guest, and to pay for all property lost or stolen while the guest remained, and nothing excused him from this liability but the act of God or the public enemy. On account of this extraordinary liability the law gave the innkeeper a lien upon the goods of his guest for the satisfaction of his reasonable charges. This lien extended to property brought by the guest and not owned by him. If A. injuriously take away the horse of B., and put him into an inn to be kept, and B. come and demand him, he shall not have him until he hath satisfied the innkeeper for his meat; and that is good law to this day, if the innkeeper have no notice of the wrong and act honestly. (*Jones* v. *Morrill*, 42 Barb., 623; 626; *McIlvane* v. *Hilton*, 7 Hun, 594; *Fox* v. *McGregor*, 11 Barb., 41, 43; *Grinnell* v. *Cook*, 3 Hill, 485; *Peet* v. *McGraw*, 25 Wend., 653; *Ingallsbee* v. *Wood*, 33 N. Y., 577.)

It will be observed that, to create the lien, the relation of innkeeper and guest must exist, for if the owner of the property be a boarder, the innkeeper has no lien. (Story on Contracts, *supra*; *Mowers et al.* v. *Fethers*, 61 N. Y., 34, and see cases above cited.)

Where an innkeeper makes a special contract for board and lodging with his guest by the week or month, he has no lien upon the goods of the guest. (*Misch* v. *O'Hara*, 9 Daly, 361.)

As to what constitutes a guest, see next section. The common-law rule as to lien of innkeepers still prevails, and has not been changed by statute.

The manner of disposing of the property of the guest of the innkeeper or boarding-house keeper, upon which a lien exists for care, board, etc., is specifically pointed out by statute (*ante*, section 1, subdivision 7 to 12 inclusive), and which is so plain that no comment will be made.

In a case where a fraud is practiced upon an innkeeper by a person receiving food or accommodation with intent not to pay for the same, or where credit is received by the use of any false pretense, or by the person so receiving food or accommodation, and thereafter absconding and surreptitiously removing his baggage without making payment, the

person so offending is guilty of a misdemeanor, and may be proceeded against criminally. (See subdivisions 5 and 14, section 1.)

## SECTION VI.

### Guests.

It is not always easy to decide when a sojourner at a hotel or inn sustains the relation of a guest. Travelers and others who come to an inn, and without previous stipulation or engagement as to the duration of their stay, or as to rate of compensation, and who are able and ready to pay for their entertainment and accommodations, and who are received and entertained and use the inn as a temporary home, are guests; and while behaving properly, and are not drunk, disorderly or laboring under contagious or infectious diseases, are entitled to be received and remain as such, if they come at a proper time, and the innkeeper can accommodate them.

But slight entertainment is necessary to be received to constitute a person a guest. (*Kopper* v. *Willis*, 9 Daly, 460.) It has been held that the purchase of a drink of liquor was enough to constitute a party a guest. (1 Wait's Law and Prac., 340; *McDonald* v. *Edgerton*, 5 Barb., 560; 2 Kent's Com., 593; *Clute* v. *Wiggins*, 14 John., 175.)

If a traveler, having stopped at a hotel, leave his horse there and go out to lodge and dine with a friend, he is a guest, and the same rule holds good so far as relates to property, for the care and keeping of which the innkeeper is to receive compensation, though the traveler leave the inn and go to a neighboring town, intending to be absent several days. (*Grinnell* v. *Cook*, 3 Hill, 486.) But if the horse be left at the inn by the owner, and he does not ask or receive accommodation there for himself, he is not a guest. (*Ingallsbee* v. *Wood*, 36 Barb., 452; affirmed, 33 N. Y., 577.)

In the case in 3 Hill, the owner first stopped at the hotel and became a guest, and did not break the relation by going away. (*McDonald* v. *Edgerton*, 5 Barb., 560.) It is not necessary that a person be at the inn in person if his property be there in charge of his wife or servant or agent, there in his employ, or as a member of his family, he is a guest,

but they must be there in such a way that the law will imply the property is in his possession. (*Coykendall* v. *Eaton*, 55 Barb., 188.)

Where a person, not being a traveler, comes upon a special contract, and stay, he is a boarder, and not a guest. So, also, a neighbor or friend, who comes at the request of the innkeeper, is not a guest. But if a traveler puts up at an inn, and be there received as a guest, he does not cease to be a guest and become a boarder, simply by making a special agreement for the price of his board per week. (2 Story on Contracts, 146, section 746; *Hancock* v. *Rand*, 17 Hun, 279.)

It will be observed by a perusal of subdivisions 13 and 15, section 1, that all persons, no matter what may have been their former condition, or of what race or color, are entitled to be received as guests at any inn and to be entertained, and receive an equal enjoyment of the accommodations of such inn, and if the innkeeper should refuse to receive them, he would be guilty of a misdemeanor. But if the person making application to be received as a guest be disorderly, the innkeeper may not only refuse him, but, after he has received him, may eject him from his house. (2 Story on Contracts, 140, section 744.)

The chamber of a guest at an inn is not his dwelling-house, but that of his landlord (*Rodgers* v. *People*, 86 N. Y., 360), the reason being that the guest has no interest, but only the use of the chamber for the time being. The legal possession of the room is in the innkeeper, who must answer for the loss of goods of the guest by theft, only giving temporary occupancy to the guest in the prosecution of his business as innkeeper. (Id.)

A person attending a dance at a hotel, on an invitation issued by the hotel keeper, and stabling his horse in the barn connected with the hotel, purchasing liquors and paying his dancing bill, has been held not to sustain the relation of a guest. (*Fitch* v. *Casler*, 17 Hun, 126.)

## SECTION VII.

### Liability of Innkeepers for Loss of Money, Jewels, etc.

As the law stood previous to the act of 1855 (chapter 421, *ante*, section 1, subdivision 1), an innkeeper's liabilities were nearly the same as those of a common carrier. He was bound to exercise the greatest diligence in regard to all the goods and chattels of his guests, whether placed in his immediate possession, or deposited in the room assigned to the guest. (*Van Wyck* v. *Howard*, 12 How., 147.) He was regarded as an insurer of all property committed to his care (*Hulett* v. *Swift*, 33 N. Y., 571), and if such property was in his house it was under his implied care, whether he was ignorant of such fact or not, and, if stolen, he was responsible. And so if stolen from the room of a guest, the innkeeper was liable, although he had no notice that they were placed there. This was so with money, jewels, ornaments, baggage or other chattels, and mere proof of a loss by a guest rendered him *prima facie* liable. He might, however, exonerate himself by proving that the guest had undertaken the exclusive custody of the goods, or that they were lost by his own negligence, or that the loss resulted from inevitable casualty. The rules of the common law touching the liabilities of innkeepers have not been relaxed by the courts, and are in full force, except as changed by statute, or as they may be modified by special contract. (*Ramaley* v. *Leland*, 43 N. Y., 539.)

The rule still prevails as to innkeepers, who do not avail themselves of the protection afforded by procuring a safe, except as it has been modified by a very recent statute (section 2, chapter 227, 1883, *ante*, subdivision 2, section 1), by which the liability of the innkeeper for the loss of wearing apparel, goods or merchandise is confined to a sum not exceeding $500, where it appears that such loss occurs without his fault or negligence; and which statute also relieves the hotel keeper from liability for the loss of any wearing apparel or other chattel, unless within a room assigned to the guest, or specially intrusted to the care and custody of such hotel keeper or his servants.

This section is stated as an amendment, but is in reality a new statute, which greatly changes the common-law rule as stated above, and is an equitable enactment. It will be observed that where a loss occurs through the fault or negligence of the innkeeper, he may still be liable in a greater sum than $500. If he do not procure the safe and give the notice as required, he is still liable for the loss of money, jewels, etc.,—money or jewels not being "goods or merchandise"—when stolen or lost from the room assigned the guest, or from his own carelessness. (*Kellogg* v. *Sweeney*, 1 Lans., 398.)

Section 1 of the act of 1855 as originally passed required notice to be posted in each of the bedrooms of the inn, but by the amendment of 1883, such notices are now only required to be posted in the office and public room, and in the public parlors, and the guest may deliver such articles to the person apparently in charge of the office for deposit in the safe. But it has been held that, if notice is given personally to the guest that a safe is provided, that it has the same force and effect as the posted notice. (*Purvis* v. *Coleman & Stetson*, 21 N. Y., 111.)

And where a guest entered his name on the register under the printed heading, as follows: "*Money, jewels and other valuable packages, it is agreed shall be placed in the safe in the office, otherwise the proprietor shall not be responsible for any loss*," and there was no proof that this notice was seen or assented to by the guest; held, that it was not his contract. (*Bernstein* v. *Sweeney*, 1 J. & S., 271; *Ramaley* v. *Leland*, 6 Rob., 558.)

The statutory exemption applies to *all* money, jewels and ornaments, and applies to every case where the guest has the time and opportunity to make the deposit; his omission to do so is a neglect within the meaning of the statute, although no carelessness or imprudence is shown. (*Rosenplaenter* v. *Roessle*, 54 N. Y., 262.) The protection to innkeepers is not limited to money or valuables in excess of what the guest may reasonably require for his traveling expenses or personal convenience, but embraces all "money, jewels or ornements" which the guest may bring with him without reference to the amount or value. (*Hyatt* v. *Tay-*

*lor*, 42 N. Y., 258; affirming, 51 Barb., 632.) And where a guest deposited a package of $20,000 in money, stating that it contained money, but not disclosing the amount, the landlord was held liable for its loss. (*Wilkins* v. *Earle*, 44 N. Y., 172.)

In the case of *Rosenplaenter* v. *Roessle* (*supra*), Judge Earl in his opinion, page 266, says, "The law is settled in this State that if a guest, on retiring to bed at night, removes a watch or jewelry from his person, or leaves money in his pockets and neglects to deposit the same in the safe provided for that purpose, he cannot hold the landlord liable for the loss of the same." The learned judge cited the case of *Hyatt* v. *Taylor* (42 N. Y., 258), in support of above, but in neither of the cases did the question arise as to a watch, and whether it was included in the exempted articles; and "a decision is only binding for such law as is necessarily decided therein." (*Sharp* v. *Fancher*, 29 Hun, 194.)

The case of *Ramaley* v. *Leland* (43 N. Y., 539), was ignored in the case of *Rosenplaenter* v. *Roselle*, *supra*. In the former case it was held that the watch of a guest at an inn, worn and used in the ordinary manner is neither a "jewel or ornament" within the meaning of the act, and the innkeeper is liable for the loss thereof in the room of the guest, notwithstanding his compliance with the act. And Judge Allen in the opinion, page 542, says, "A watch is neither a jewel or ornament, as these words are used and understood, either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a time piece or chronometer—an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is carried for use and convenience and not for ornament." In this case the question was before the court, and its decision will undoubtedly prevail. In support of above, see *Bernstein* v. *Sweeney* (1 J. & S., 271).

A guest neglected to deposit a large package containing jewelry. About the time he was to leave the hotel he packed his trunk, in which he put the package, then delivered the key of his room to the hotel clerk, requesting the trunk brought down immediately. Before brought down the room was entered and the package stolen from the trunk, and the

innkeeper was held to be liable, and that the act was not intended to apply to losses occurring before the guest had an opportunity to make the deposit, or after he had packed his trunk and given notice for immediate departure. (*Bendetson* v. *French*, 46 N. Y., 266.)

The liability of the innkeeper is great, and he should be careful to provide a suitable safe, and post the notices as required by law and with care he is relieved of much of the common law liability.

## SECTION VIII.

### Liability for Loss of Guests' Baggage and Effects Generally.

The common law liability of innkeepers, for the loss of the chattels of their guests, has been briefly laid down and alluded to in the preceding section. This liability has been very much lessened by statutes. The liability for the loss of money, jewels, etc., has been already treated of. The statutes limiting the liability generally are given (*ante*, subdivisions 2, 3 and 4, section 1.) By subdivision 2, passed in 1883, the liability is limited to a sum not exceeding $500, where the loss occurs without the fault or negligence of the hotel keeper; and in no case is he liable unless the goods or chattels are within the room assigned to the guest, or specially intrusted to the care and custody of the hotel keeper or his servants. By section 3, he is not liable for property stored in the hotel barn or out-building with the knowledge of the guest, and consumed by fire, where such fire is the work of an incendiary, and occurs without the fault or negligence of the innkeeper. And by subdivision 4, his liability for loss by fire of any animal is limited to $300, unless by agreement a higher estimate is agreed upon.

These statutes do away with many of the decisions affecting the liability of hotel keepers made before the statutes were passed, and which decisions will not now be cited.

The common law liability, except as limited by statute, is still in force. And to enforce the strict common law liability of an innkeeper the technical relation of guest and innkeeper must be established. (*Mowers et al.* v. *Fethers*,

61 N. Y., 34; *Ingallsbee* v. *Wood*, 33 id., 577; *Fitch* v. *Casler*, 17 Hun, 126.)

The rule of the common law was stated in *Cross* v. *Andrews* (Croke's Eliz.), as follows: "The defendant, if he will keep an inn, ought, *at his peril*, to keep safely his guests' goods. He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond for their loss, whether caused by his own negligence or by the depredations of knaves and marauders, within or without the curtilage." (*Hulett* v. *Smith*, 33 N. Y., 574.) The above case was decided in 1865, and the rule, as stated above, was held to be good then.

Under the provisions of the innkeeper act of 1866 (chapter 658, *ante*, section 1, subdivision 3), exempting an innkeeper from liability for the loss by fire of property of a guest in a barn or out-building, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. (*Faucett* v. *Nichols*, 64 N. Y., 377.)

Negligence which precedes and facilitates the commission of the crime is as much within the statute as the negligent omission to protect and remove the property after discovery of the fire. (Id.)

An innkeeper is responsible for the safe-keeping of a load of goods belonging to a traveler who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open uninclosed space near the highway. (*Piper* v. *Manny*, 21 Wend., 282.) The place where the goods are deposited is not the test; it is whether they are in the custody of the innkeeper or at the risk of the guest. (Id., 283.) But if sheep be put to pasture under the direction of the guest, and are injured by eating poisonous plants, the innkeeper is not liable unless chargeable with negligence or want of due care. (*Hawley* v. *Smith*, 25 Wend., 642.)

In one case the guest put his horses in the barn, had them fed, and took dinner himself. After paying his bill he requested the innkeeper to get his team; the latter told him to go on and hitch up, and he would be there soon. In

leading the horses out one of them was kicked, resulting in its death, and it was held that the innkeeper's liability was not at an end; that unless there was some improper conduct on the part of the guest, the innkeeper was as much liable as though leading them himself. That he was simply doing what it was the duty of the innkeeper to do himself, and was so doing at his request. (*Seymour* v. *Cook*, 53 Barb, 451.)

An innkeeper letting the hall in his hotel for public purposes, holds out to the public that it is safe, and is bound to exercise proper care in providing safe arrangements for entrance and departure to those invited to the hall, and where a person is injured through a dangerous condition of the premises, the owner is liable to respond in damages. (*Camp* v. *Wood*, 76 N. Y., 92.)

By chapter 446 of the Laws of 1860, the keeper of a boarding-house has the same lien upon and right to detain baggage and effects of any boarder, for the amount which may be due for board by such boarder, to the same extent and in the same manner as innkeepers have such lien and such right of detention.

Under the above statute the keeper of the boarding-house has the lien without reference to the character of the guests, whether they are transient or permanent boarders. (*Stewart* v. *McCready*, 24 How., 62.) But this lien only exists for the amount actually due by the boarder, and not including board to become due under an agreement to board in future; nor can it be extended to any other indebtedness, nor to any demand not due at the time of the detention. (*Shafer* v. *Guest*, 35 How., 184.) The act confers no greater rights than innkeepers possessed at common law. (*McIlvane* v. *Hilton*, 7 Hun, 594.) The lien exists upon goods brought upon the premises by a boarder, to furnish his room, although they in fact do not belong to the boarder but to a stranger. (*Jones* v. *Morrill*, 42 Barb., 623.)

The boarding-house keeper is also liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment. He must exercise due and proper care of the baggage or property of his boarder, such as a prudent per-

son would take of his own property. (*Smith* v. *Read*, 52 How., 14.)

The lien of boarding-house keepers and their liability for the loss of the effects of their boarders, does not extend to every private house-keeper, who may occasionally keep one or more boarders, but only to those where the business of keeping boarders is generally carried on, and which is held out, by the owner or keeper, as a place where boarders are kept. (*Cady* v. *McDowell*, 1 Lans., 484 )

As this part of the work is intended more especially for the benefit of innkeepers, no more of the many decisions in relation to boarding-house keepers will be cited. It will be noticed by reference to the statute as amended in 1883 (*ante*, section 1, subdivision 6), that it is no longer necessary for boarding-house keepers to post that statute or their rate of charges in their house.

Boarding-house keepers are given a lien upon the effects of their guests, but innkeepers have no lien upon the effects of their boarders.

## SECTION IX.

### Enforcing the Liability.

Under the earlier decisions upon the subject of suits to enforce the liability incurred by innkeepers, for the loss of their guests' baggage or other chattels, such an action was not one that would authorize an order of arrest under section 179 of the Code of Procedure, except when the defendant was not a resident of the State, or being such was about to depart therefrom, etc. (*People* v. *Willett*, 26 Barb., 78.) But in a late case it was held to come within section 549 of the Code of Civil Procedure, and, therefore, the defendant might be arrested in the first instance by an order of arrest; or at the end of a judgment an execution might be issued thereon, being, as therein held, for an "injury to property," as stated in section 549. (*Catlin* v. *Adirondack Co.*, 20 Hun, 19.) This was a case against a common carrier. But in *Hallenbake* v. *Fish* (8 Wend., 547), it was decided that the liability of an innkeeper and common carrier were similar.

The complaint, however, should allege the cause of action

as in other cases, in a plain concise manner, either on contract or in tort, and the former might be unsafe. It should never be upon contract and in tort, else the defendant, if successful, would have conferred upon him the right to the most beneficial remedy for the collection of his costs, and therefore an execution against the body might issue on his judgment; while if the plaintiff should be successful in recovering a judgment in such a case, the defendant would not be liable in tort, but upon a contract. (*Miller* v. *Scherder*, 2 N. Y., 262.)

If the plaintiff desires to escape the perils of imprisonment if he is unsuccessful, he must be careful of his pleadings, and found his complaint entirely upon contract; while if he desires the benefit of section 549, he must plead in tort, and in such a manner that there may be no mistake as to his intention.

By an examination of the authorities cited in the *Catlin Case* (*supra*), the rule so far as settled, will be apparent.

# FORMS.

## No. 1.

*Oath of Office of Commissioner of Excise.*

STATE OF NEW YORK, }
*County of Albany,* } *ss.:*

I, ....., do solemnly swear that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of commissioner of excise of the town of Knox, in said county, according to the best of my ability.

And I do further solemnly swear that I have not, directly or indirectly, paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote.

.....

Subscribed and sworn to before me, }
this ..... day of ....., 1883. }

.....

.....

## No. 2.

*Bond of Commissioner of Excise.*

*Know all men by these presents:* That we, A. B., C. D. and E. F., each of the town of Knox, county of Albany, and State of New York, are held and firmly bound unto G. H., supervisor of said town, and to his successor in office, in the penal sum of $..... (double the amount of the excise money of the preceding year), to be paid to the said supervisor, or to his successor in office, for which payment well and truly to be made, we bind ourselves, our and each of

our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ..... day of ....., 1883.

Whereas, the above bounden A. B. was, on the ..... day of ....., 1883, duly elected commissioner of excise of the said town of Knox, for the term of three years; now, therefore, the condition of this obligation is such that, if the said A. B. shall faithfully discharge the duties of his office as such commissioner of excise, and shall, within thirty days after the receipt thereof, pay over to the said supervisor, or to his immediate successor or successors in office, all moneys received by him as such commissioner of excise, then this obligation to be void, otherwise to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this ..... day of ....., 1883.

..... [L. S.]
..... [L. S.]
..... [L. S.]

I hereby approve of the foregoing bond, both as to form, and as to the sufficiency of the sureties.

Dated ....., 1883.

G. H., *Supervisor.*

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## No. 3.

*Application for Innkeeper's License—Section* 12, *Chapter* 1.

*To the Board of Commissioners of Excise, in and for the ... ... of ....., county of .....:*

The undersigned *applicant* for license, respectfully *represent* that ..... *desire* to sell and dispose of STRONG AND SPIRITUOUS LIQUORS, WINES, ALE AND BEER, in quantities less than five gallons at a time, to be drank on the premises at ....., of ....., county of..... That ..... *propose* to keep an inn, tavern or hotel thereat; that ..... the only *person* interested in the business to authorize which the license shall be used.

Dated ....., 1883.

(Signed) .....
.....

*County of .....*, *ss.:*

....., being duly sworn, *say* , the foregoing application by *h* subscribed is true.

.....

Subscribed and sworn to before me, this ..... day of ....., 188 .

.....
..... .... .....

## No. 4.

*Application for Storekeeper's License—Sections* 12, 22 *and* 23.

*To the Board of Commissioners of Excise of the .....:*

The undersigned respectfully *represent* that ..... desirous to sell and dispose of strong and spirituous liquors, wines, ale and beer in quantities less than five gallons at a time, at ....., in the ..... of ....., but not to be drank on the said premises, nor in the house or shop of the undersigned, or in any out-house or yard or garden appertaining thereto or connected therewith.

And, therefore, ....., who ..... the only *person* to be interested in the said business, *pray* that a license may be granted to the undersigned for the purpose aforesaid, on ..... paying such lawful license fee as may be required in the premises.

Dated ....., 188 .

..... .....

.....

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## No. 5.

*Application for License to sell Ale and Beer—Sections* 12, and 45.

*To the Board of Commissioners of Excise, in and for the ..... of ....., county of .....:*

The undersigned *applicant* for license respectfully *represent* that ..... desirous to sell and dispose of ALE and BEER in quantities less than five gallons at a time, to be drank on the premises, at ..... of ....., county of ....., and pray on ..... own behalf, as the only *person* intended to be interested in the business aforesaid, that ..... may have a license as above stated, pursuant to law, upon paying such license fee as may be lawfully required in the premises.

Dated ....., 188 .

..... .....

.....

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## No. 6.

*Bond of Innkeeper—Section* 18.

*Know all men by these presents*: That we, ..... and ..... and ....., each of the ..... of ....., county of ....., and State of New York, are held and firmly bound unto the people of the State of New York, in the penal sum of $250, to be paid to the said people; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the ..... day of ....., 188 .

Whereas, the said ..... intends keeping an inn, tavern or hotel, at ....., in the said ....., and is an applicant to the board of commissioners of excise of ....., for a license to sell strong and spirituous liquors, wines, ale and beer, to be drank in the said inn, tavern or hotel, to be kept as aforesaid, pursuant to the provisions of an act entitled "An act regulating the sale of intoxicating liquors," passed April 11th, 1870.

*Now, therefore, the condition of this obligation is such,* that if the said ....., during the time that he shall keep such inn, tavern or hotel, will not suffer it to be disorderly, or suffer any gambling, keep a gambling table of any description within the inn, tavern or hotel so kept by him, or in any out-house, yard or garden belonging thereto, then this obligation to be void, else to remain in full force.

..... [L. S.]
..... [L. S.]
..... [L. S.]

Signed, sealed and delivered in presence of }

.....

*County of .....*, ss.:

On this ..... day of ....., A. D. 188 , before me personally came ....., to me known to be the individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same for the uses and purposes herein mentioned.

.....

*County of .....*, ss.:

..... and ..... of the ....., in said county, being duly sworn, each for himself doth depose and say, that he is worth the sum of $500 above all just debts and liabilities, and the deponents reside in the ....., county of ....., and State of New York.

..... .....
.....

Subscribed and sworn before me, this ..... day of ....., 188 . }

.....

We, the undersigned, commissioners of excise of ....., do hereby approve of the security to the above bond.

Dated at ....., this ..... day of ....., 188 .

.....
.....
..... .....

## No. 7.

*Bond for Storekeeper's License—Section* 23.

*Know all men by these presents:* That we, ..... and ..... and ....., of ....., county of ....., and State of New York, are held and firmly bound unto the people of the State of New York, in the sum of $500, to be paid to the said people; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the ..... day of ....., 188 .

Whereas, the said..... is an applicant to the board of commissioners of excise of the ..... for a license to sell strong and spirituous liquors, wines, ale and beer, as a store-keeper, pursuant to the provisions of an act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, and the acts passed in addition and subsequent thereto.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said ....., during the time that he shall keep any store, will not, during the term for which such license shall be granted, suffer his place of business to become disorderly, and will not sell or suffer to be sold any strong or spirituous liquors, or wines, ale or beer, to be drank at said premises, or in his shop or house, or in any out-house, yard or garden appertaining thereto, and that ..... will not suffer any such liquors sold by virtue of such license to be drank in his shop or house, or in any out-house, yard or garden belonging thereto, then this obligation to be void, else to remain in force.

..... [L. S.]
..... [L. S.]
..... [L. S.]

Signed, sealed and delivered in the presence of

.....

*County of ....., ss.:*

On this ..... day of ....., 188 , before me personally came ....., to me known to be the persons described in and who executed the foregoing bond, and severally acknowleged that they executed the same for the purposes therein mentioned.

.....

*County of ....., ss.:*

....., of the ....., in said county, being duly sworn, each for himself doth depose and say, that he is worth the sum of $1,000 above all just debts and lia-

bilities, and that deponents reside in the ....., county of ....., and State of New York.

Subscribed and sworn to before me, this ..... day of ....., 188 .

.....

We, the undersigned, the board of commissioners of excise of ....., do hereby approve of the security to the above bond.

Dated at ....., this ..... day of ....., 188 .

.....

..... .....

.....

*Commissioners of Excise.*

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## No. 8.

*Bond for Sale of Ale and Beer—Section* 45.

*Know all men by these presents:* That we, ..... and ..... and .. ... of ....., county of ....., and State of New York, are held are firmly bound unto the people of the State of New York, in the penal sum of $250, to be paid to the said people; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ..... day of ..... , 188 .

Whereas, the said ..... is an applicant to the board of commissioners of excise of ..... for a license to sell ale and beer at his premises ....., in the ....., according to the provisions of an act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, and the acts supplemental thereto and amendatory thereof.

Now, therefore, the condition of this obligation is such, that, if during the term for which ..... license shall be granted, ..... will not suffer ..... place of business to become disorderly, or suffer any gambling or keep any gambling table of any description within the premises so kept by ....., and that ..... will not sell, or suffer to be sold, any strong or spirituous liquors or wines, except ale and beer, at the place aforesaid, or in any out-house, yard or garden appertaining thereto, then this obligation to be void, else to remain in force.

..... [L. S.]

..... [L. S.]

..... [L. S.]

Signed, sealed and delivered in presence of

.....

*County of ....., ss.:*

On this ..... day of ....., 188 , before me personally came ....., to me known to be the individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

.....

The same justification by the sureties, and approval by the commissioners of excise, will be required in the foregoing bond as in No. 6.

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## No. 9.

*License to Sell Strong and Spirituous Liquors, and Wines, Ale and Beer—Sections 11, 12, 13 and 17.*

[License expires ....., 188 . No. .....]

THE BOARD OF EXCISE of ....., hereby certifies that being satisfied that ....., of good moral character, that he ha sufficient ability to keep an inn, tavern or hotel, and the necessary accommodations to entertain travelers; and that an inn, tavern or hotel is required for the actual accommodation of travelers at the place where such applicant resides or proposes to keep the same.

*Now, therefore,* a license is granted to ....., permitting ..... to sell and dispose of *strong and spirituous liquors, wines, ale and beer,* in quantities less than five gallons at a time, to be drank on the premises of said ....., at ....., excepting on Sundays or election days, or between one and five o'clock, A. M., and shall expire on the first Monday of May next,* pursuant to the provisions of the act of the legislature of the State of New York, passed April 11, 1870, entitled "An act to regulate the sale of intoxicating liquors," and of the acts amendatory thereof.

This license is granted and accepted upon the express condition that the holder shall conform to the requirements of the said acts of the legislature, and that in case of any breach of such condition this license immediately shall be and become null and void.

Witness our hands this ..... day of ....., 188 .

.....

.....

.....

*Commissioners of Excise of ... ..*

[This license must be kept in a conspicuous place.]

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*In the cities of New York, Brooklyn and Rochester all licenses shall expire at the end of one year from the time they shall be granted. (Section 11.)

## No. 10.

*Store-keeper's License to Sell Strong and Spirituous Liquors, Wines, Ale and Beer—Sections* 11, 22 *and* 23.

THE BOARD OF EXCISE of ..... hereby certifies, that a license is granted to ....., permitting ..... to sell and dispose of *strong and spirituous liquors, wines, ale and beer*, in quantities less than five gallons at a time, at ....., excepting on Sundays or election days, or between one and five o'clock in the morning; but not to be drank in h house or shop, or in any out-house, yard or garden appertaining thereto or connected therewith, and shall expire on the first Monday of May next,* pursuant to the provisions of the act of the legislature of the State of New York, passed April 11, 1870, entitled "An act to regulate the sale of intoxicating liquors."

This license shall not be deemed to authorize the sale of any strong or spirituous liquors or wine to be drank in the house or shop of the person receiving the same, or in any out-house, yard or garden appertaining thereto, or connected therewith, and is granted and accepted upon the express condition that the holder shall conform to the requirements of the said act of the legislature, and that in case of any breach of such condition this license immediately shall be and become null and void.

Witness our hands this ..... day of ....., 188 .

.....

.....

.....

*Commissioners of Excise of .....*

[This license must be kept in a conspicuous place.]

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## No. 11.

*License to Sell Ale and Beer Only—Section* 45.

THE BOARD OF EXCISE of ..... hereby certifies, that a license is granted to ....., permitting ..... to sell and dispose of *ale and beer only*, in quantities less than five gallons at a time, at ....., excepting on Sundays or election days, or between one and five o'clock, A. M., which shall expire on the first Monday of May next,* pursuant to the provisions of the act of the legislature of the State of New York, passed April 16, 1857, entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," as amended by chapter 856 of the Laws of 1869.

This license is granted and accepted upon the express condition that the

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* See note to No. 9.

holder shall conform to the requirements of the said act of the legislature, and that in case of any breach of such condition this license immediately shall be and become null and void.

Witness our hands this ..... day of ....., 188 .

.....

.....

.....

*Commissioners of Excise of* .....

[This license must be kept in a conspicuous place.]

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## No. 12.

*Complaint against Hotel Keeper for Failure to Keep Requisite Accommodations—Section* 19.

..... COURT.

JOHN DOE as sole Overseer of the Poor of the town of ....., ..... county, N. Y.,
*against*
RICHARD ROE.

Plaintiff complains of the defendant and alleges:

I. That the plaintiff is the sole and only duly elected, qualified and acting overseer of the poor in and for the town of ....., in the county of ..... and State of New York.

II. That the defendant is a duly licensed inn, tavern or hotel keeper, under the provisions of chapter 628 of the Laws of 1857, entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," and the laws supplementary thereto and amendatory thereof. That as such inn, tavern or hotel keeper he fails and neglects to keep in his said house, inn, tavern or hotel, for the accommodation of travelers thereat, the articles required by section 8 of said act, one or more of them as therein enumerated, to wit: "At least three spare beds for his guests, with good and sufficient bedding, good and sufficient stabling and provender of hay in winter (or hay or pasture in the summer), and grain for four horses or other cattle more than his own stock." And especially has the defendant failed and neglected, and now fails and neglects, to keep in his said house for the accommodation of travelers* [here recite any specific article which the defendant fails to keep as required by section 19].

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*The practitioner in pleading under any section is referred to 22 Hun, 274; 5 id., 564; 25 id., 195; 62 How., 313; which will prompt him to observe great care in making his allegations specific.

III. That by reason of such default in not keeping such articles, or either of them, the defendant as such inn, tavern or hotel keeper has forfeited to the plaintiff as such overseer of the poor the penalty of ten dollars, for the use of the poor, in accordance with the provisions of sections 8 and 22 of said act as amended. Plaintiff, therefore, demands judgment against the defendant for ten dollars, with costs of action.

A. B., *Plaintiff's Attorney.*

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## No. 13.

*Complaint against a Hotel Keeper for failure to put up and keep up a sign—Section* 20.

[Title of cause.]

I. Same as in No. 12.

II. That the defendant, on the ..... day of ....., 188 , was duly licensed to keep an inn, tavern or hotel in the town of ... ., ..... county, and State of New York, under the excise laws of this State, and pursuant to the provisions of an act entitled "An act to regulate the sale of intoxicating liquors," passed April 11, 1870, chapter 175; and has ever since continued to keep an inn, tavern or hotel in said town, under and by virtue of such hotel keeper's license as aforesaid.

III. That the defendant failed, within thirty days after obtaining his license as aforesaid, to put up a proper sign on or adjacent to the front of his said house, with his name thereon, indicating that he keeps an inn, tavern or hotel, contrary to section 9, chapter 628 of the laws of 1857, and has ever since neglected, and still neglects, to put up and keep up such sign, in all for the period of ten months from the ..... day of ....., 188 .

IV. That the defendant thereby became, and is indebted, to this plaintiff as such overseer of the poor, in the penalty and sum of ten dollars for each month's neglect to put up and keep up such sign, to wit: the period of ten months, whereby this action has accrued according to the provisions of chapter 628, of the laws of 1857, for the aggregate sum of $100, for which sum plaintiff demands judgment besides costs of action.

A. B., *Plaintiff's Attorney.*

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## No. 14.

*Complaint against Hotel Keeper for Taking Security for Liquors Trusted—Section* 21.

[Title of cause.]

I. Same as in No. 12.

II. That on the ..... day of ....., 188 , the defendant being an inn, tavern or hotel keeper in the town of ....., in the county of ....., duly

licensed as such under and by virtue of the excise laws of this State, did trust John Doe, who was not a lodger in defendant's said hotel, in the sum of ten dollars, for strong or spirituous liquors, wines, ale and beer, sold by the said defendant to the said John Doe, and especially did the defendant, on said day, trust said John Doe for bourbon whiskey, in said sum of ten dollars, and did take a chattel mortgage (or other security) upon certain personal property of said John Doe, as security for said debt incurred as aforesaid, with intent to evade the provisions of section 10, chapter 628 of the Laws of 1857, and the laws amendatory thereof.

III. That the defendant thereby, and by reason of the facts aforesaid, did forfeit to the plaintiff double the sum intended to be secured by the taking of such security, to wit, the sum of twenty dollars, according to the provisions of chapter 628 of the Laws of 1857, for which sum plaintiff demands judgment, besides costs of action.

A. B., *Plaintiff's Attorney.*

---

## No. 15.

*Complaint for Selling Liquors in Quaatities less than five Gallons at a time without a License—Section* 24.

[Title of cause.]

I. Same as in No. 12.

II. That the defendant, on the first day of July, 188 , and on each and every day between and including the first day of July, 188 , and the fifth day of July, 188 , sold or caused to be sold, by his duly authorized agents, strong and spirituous liquors, wines, ale and beer, at his house or shop in the town of ....., county of ....., in quantities less than five gallons at a time, without having a license therefor, granted as provided by chapter 175 of the Laws of 1870, and the acts amendatory thereof; and especially did the said defendant on the days aforesaid, and each of them, sell brandy to one John Doe in quantities less five gallons at a time, without having a license therefor as aforesaid.*

III. That thereby the defendant became and is indebted to this plaintiff in the penalty and sum of fifty dollars, for each and every act of selling liquors as aforesaid, whereby this action accrued according to the provisions of sections 13 and 22 of chapter 628 of the Laws of 1857, and the amendatory act of 1869, for the aggregate sum or amount of $....., for which sum plaintiff demands judgment, besides costs of action.

A. B., *Plaintiff's Attorney*

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* See note to No. 12.

NOTE.—Under those sections giving a penalty or forfeiture for each offense, when it is desired to prosecute for more than one penalty or forfeiture in the same action, a new cause of action should be inserted stating the facts constituting each offense separately, in substance like II in the above complaint, simply changing dates, kinds of liquor, etc., to conform to the facts. III covers any number of counts. It will be readlly understood that a complaint must be formu'ated to fit the individual circumstances of each case.

## No. 16.

*Complaint for Selling Liquor to be Drank on the Premises without a License—Section* 25.

[Title of cause.]

I. Same as No. 12.

II. That the defendant being a resident of ....., in the county of ....., did, at his house, shop or hotel [here specify the location by street and number, or otherwise] on each and every day between the ..... day of ....., 188 , and the ..... day of ....., 188 , sell strong and spirituous liquors, wines, ale and beer, to be drank in his said house or shop, or in an out-house, yard or garden appertaining thereto, or one of them, without having a license therefor as provided by the act entitled "An act regulating the sale of intoxicating liquors," passed April 11, 1870, and especially did the said defendant, on each of the days aforesaid, sell gin to one John Doe to be drank in his said house, without having a license therefor as aforesaid.

III. That thereby the defendant became indebted to said plaintiff in the penalty and sum of fifty dollars for each* of such acts of selling liquors without a license, whereby this action accrued according to sections 14 and 22 of chapter 628 of the Laws of 1857, for the aggregate amount or sum of $..... Wherefore plaintiff demands judgment against the defendant for the sum of $....., besides costs of action.

A. B., *Plaintiff's Attorney.*

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## No. 17.

*Complaint against an Officer for Failure to Arrest a Person Intoxicated in a Public Place—Section* 28.

[Title of cause.]

I. Same as in No. 12.

II. That the defendant was, at the time hereinafter stated, a [here state whether sheriff, under-sheriff, deputy-sheriff, constable, marshal, policeman or officer of police], duly [elected or appointed] and qualified in and for the [town and county]. That on the ..... day of ....., 188 , ..... was intoxicated in the public streets in the village of ....., said county, and said defendant found said person so intoxicated at said time and in said place, and neglected and refused to apprehend and arrest said person so found intoxicated by him, or to cause him to be apprehended and arrested, and neglected and refused to take such intoxicated person, or cause him to be so taken, before a magistrate of the [city or town] where said officer resided, as required by section 17, chapter 628 of the Laws of 1857, as amended by section 2 of chapter 856 of the Laws of 1869.

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* See pages 106 and 107, and note to No. 15.

III. That thereby the defendant became and is indebted to this plaintiff in the penalty and sum of fifty dollars, and full costs of suit, whereby this action accrued according to the provisions of said statute above mentioned, and for which sum plaintiff demands judgment, besides costs.

A. B., *Plaintiff's Attorney.*

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## No. 18.

*Complaint Against a Magistrate for Refusal to Entertain a Complaint—Section* 28.

[Title of cause.]

I. Same as in No. 12.

II. That on the ..... day of ....., 188 , John Doe, a constable [or other officer enumerated in No. 17], of the town [or city] of ....., in the county of ....., apprehended and arrested ....., who was found intoxicated in a public place, to wit: Main street, in the said village of ....., and took said person before ....., Esq., a justice of the peace in and for the town of ....., said county, and made complaint before said justice, that he had found said ..... intoxicated in a public place in said town, but that said ..... refused to entertain such complaint, and make examination into said charge of drunkenness in a public place, as required by section 17, chapter 628 of the Laws of 1857, as amended by section 2, chapter 856 of the Laws of 1869.

III. Same as in No. 17.

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## No. 19.

* *Complaint for Selling or Giving Liquor to Intoxicated Person—Section* 29.

[Title of cause.]

I. Same as in No. 12.

II. That the defendant, on the 1st, 2d and 3d days of July, 188 , and on each and every of such days, sold or gave away strong and spirituous liquors, wines, ale and beer, and especially brandy, to John Doe, a person then being intoxicated, or suffered such liquor or liquors to be sold or given away under his direction or authority, to such intoxicated person, contrary to the provisions of section 18 of the act entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857.

III. That by reason of such acts as aforesaid, the defendant has forfeited to the plaintiff as such overseer of the poor the penalty of twenty-five dollars for each of the times he so sold, or caused to be sold, the liquor as aforesaid,

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* See note to No. 15.

amounting in the aggregate to the sum of $....., for which sum plaintiff demands judgment, besides costs of action.

A. B., *Plaintiff's Attorney.*

---

## No. 20.

*Complaint to Overseer of the Poor for a Violation, and Requiring him to Prosecute for the Penalty Incurred—Section* 41.

*To ....., Overseer of the Poor of the town of ....., ..... county, N. Y.:*

SIR—I hereby make complaint against C. D., and charge that he, at his house or hotel in the town of ....., county of ....., on the ..... day of ....., 188 , and on each and every day of said month, sold strong and spirituous liquors, wines, ale and beer, openly to various and divers persons, and especially did he, on said ..... day of ....., sell [or give] brandy and gin to John Doe and Richard Roe and to each of them, to be drank in his said house [outhouse, yard, etc.], without having a license therefor as provided by chapter 175 of the Laws of 1870, and I herewith furnish reasonable proof of such violation, and demand that you, as such overseer of the poor of said town, prosecute said C. D., for the penalty prescribed therefor by section 14 of chapter 628 of the Laws of 1857, for selling intoxicating liquors to be drank on his premises without having a license therefor.*

Dated ....., 188 .

A. B.

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## No. 21.

*Proof to be submitted with No.* 20—*Section* 41.

*County of ....., ss.:*

E. F. and G. H., each being severally duly sworn, depose and say, that on the ..... day of ....., 188 , they were in the bar-room of the hotel owned and kept by C. D., in the town of ....., county of ....., and while so there saw said C. D. sell brandy and gin to John Doe and Richard Roe, and that each of said persons drank said liquors so purchased of C. D. at said time and place.

Subscribed and sworn to before me, this ..... day of ....., 188 .

.....

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* This complaint can be used where any penalty is given to the overseer by substituting the proper allegations, and alluding to the appropriate statute.

## No. 22.

*Complaint against Hotel Keeper for Selling Liquors to an Indian, Apprentice or Minor Under Eighteen Years of Age—Section* 26.

..... COURT.

JOHN DOE
*agst.*
RICHARD ROE.

Plaintiff complains of the defendant and alleges:

I. That plaintiff is the [master, mistress, father, mother or guardian] of ..... [an Indian, apprentice or a minor under the age of eighteen years].

II. That the defendant is an inn, tavern or hotel keeper, duly licensed to sell strong and spirituous liquors, wines, ale and beer, in and for the town of ....., ..... county, N. Y., under chapter 175 of the Laws of 1870, as amended by chapter 549 of the Laws of 1873. That on each and every day between and including the ..... day of July, 188 , and the ..... day of July, 188 , and while so keeping said inn, tavern or hotel the defendant either personally, or by his wife, servant or employee or other agent, knowing or having reason to believe that said ..... was the [apprentice or, etc.,] of the plaintiff, without the consent of the plaintiff, sold or gave away to such [apprentice or, etc.,] strong or spirituous liquors, wines, ale and beer, and especially did the defendant sell, on each of the days aforesaid, brandy to said ..... without the consent of this plaintiff,* contrary to section 15 of chapter 628 of the Laws of 1857, as amended by chapter 420 of the Laws of 1870.

III. That thereby the defendant has forfeited and become indebted to this plaintiff in the sum of ten dollars for each and every time he so sold said liquor or liquors, whereby this action accrued, according to the provisions of said statutes, amounting in the aggregate to the sum of $....., for which sum plaintiff demands judgment, besides costs of action.

A. B., *Plaintiff's Attorney.*

## No. 23.

†*Complaint by Wife or Husband against Dealer in Intoxicating Liquors for Illegally Selling to Plaintiff's Husband or Wife—Section* 30.

..... COURT.

MARY ANN DOE
*agst.*
RICHARD ROE.

Plaintiff complains of the defendant and alleges:

* See notes to Nos. 12 and 15. † See note to No. 15.

I. That plaintiff is a married woman, and the wife of A. B., who is an habitual drinker of intoxicating liquors.

II. That the defendant, who is a dealer in intoxicating liquors in the town of ....., county of ....., was duly notified, in writing, by [name and office of magistrate, or overseer of the poor] of the town of ....., that said A. B., the husband of plaintiff, was an habitual drinker of intoxicating liquor, and was also forbidden thereby to sell or give away any such liquors to him for the term of six months from the time of the giving of such notice, in pursuance of section 19 of chapter 628 of the Laws of 1857.

III. That on each and every day from and including the ..... day of ....., 188 , to the ..... day of ....., 188 , the defendant sold or gave away intoxicating liquors, wines, ale and beer to said A. B., and especially did he sell said A. B. brandy on each of said days, after having been notified and forbidden, as aforesaid, in violation of said statute.

IV. That thereby the defendant became and is indebted to this plaintiff in the penalty and sum of fifty dollars for each act of selling or giving away of liquors, as aforesaid, whereby this action accrued according to the provisions of said statute, for the aggregate amount or sum of $....., for which sum plaintiff demands judgment, beside costs of action.

A. B., *Plaintiff's Attorney.*

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## No. 24.

* *Complaint by Wife that her Husband is an Habitual Drinker of Intoxicating Liquors—Section* 30.

*County of ....., ss.:*

Mary Ann Doe, of the town of ....., being duly sworn, says, that her husband, John Doe, is an habitual drinker of intoxicating liquors, and [here give definite statement as to his habits], and deponent hereby makes complaint, on her information and belief, that her said husband procures the liquors drank by him of the following named dealers in intoxicating liquors: ....., and hereby requires you as [magistrate or overseer of the poor] of the town of ..... to notify and forbid said dealers not to sell or give away intoxicating liquors to said John Doe, in accordance with the provisions of section 19 of chapter 628 of the Laws of 1857.

Subscribed and sworn to before me, }
this ..... day of ....., 188 . }

.....

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* The same complaint and proof is required in the case of wife, parent or child under section 30.

## No. 25.

*Notice to Dealers Not to Sell to an Habitual Drinker—Section* 30.

*To .....:*

Take notice, that complaint has been duly made to me [overseer or magistrate] in accordance with section 19, chapter 628 of the Laws of 1857, that John Doe is an habitual drinker of intoxicating liquors. You are, therefore, hereby forbidden to sell or give away such liquors to said John Doe for the term of six months from the service of this notice upon you, under a penalty of fifty dollars, and costs of suit, for each and every disobedience of this order.

Dated ....., 188 .

.....

*Overseer, etc., or Magistrate, etc.*

---

## No. 26.

*Complaint on Hotel Keeper's Bond—Sections* 18 and 35.

SUPREME COURT—County .....

The People of the State of New York
*against*
A. B., C. D. and E. F.

The plaintiffs, complaining of the defendants allege on information and belief—

I. That the defendant A. B., is a licensed hotel keeper under chapter 175 of the laws of 1870, and its amendments, residing and keeping hotel in the village of ....., at [street and number].

II. That said village is a municipal corporation under the laws of this State [omit II if the action is not prosecuted by the trustees of a village].

III. That on or about the first Monday of May, 188 , the defendant A. B., duly made application for, and received a hotel keeper's license under said statute, to sell strong and spirituous liquors, wines, ale and beer, to be drank in his inn, tavern or hotel, from the board of commissioners of excise of the town of ....., in which such village is situate.

IV. That previous to the granting of such license to said A. B., he made, executed and delivered to said board of commissioners of excise the bond required to be given by an inn, tavern or hotel keeper, by section 7 of chapter 628 of the Laws of 1857, which bond bears date May ....., 188 , and the defendants, C. D. and E. F., duly became sureties upon said bond, and justified as required by law, and the same was thereupon duly delivered to said board of commissioners of excise of said town, and they thereupon duly approved of the sureties to said bond, and the said license was thereupon duly issued as

aforesaid. That the following is a copy of said bond, acknowledgment, justification and approval [here insert copy of bond].

That thereupon the said A. B. became a duly licensed inn, tavern or hotel keeper in said town, and as such authorized to sell strong and spirituous liquors, wines, ale and beer, under the terms of said license, but not otherwise.

V. That said A. B. notwithstanding the restrictions contained in said bond, at divers times, and on each and every day subsequent to the granting and delivery of such license to him, caused a breach of the conditions of said bond, and did keep a gaming table within his inn, tavern or hotel, so kept by him, and did suffer gambling within his inn, tavern or hotel, and did keep therein a billiard table or gaming table, and that his guests and others used it under a rule that the losing party of each game should pay the said A. B. for the use of the table a specific sum of money, and furnished lights and attendants at said table; that he also kept, during said time, a gaming table within said hotel, on which was played a game called pin pool, for the use of those who frequented said hotel, and upon which gaming was allowed and permitted by said A. B., the losing party paying for drinks and entertainment furnished by said A. B., who permitted gambling to be done on said table, and did also suffer gambling to be done in his said hotel, with dice, and did suffer dice to be shaken for the drinks and cigars therein, the losing party to pay therefor; and did suffer said hotel to be disorderly within the intent an meaning of the statute under which said bond was given, during the whole time that elapsed between the time of the granting of such license and the commencement of this action, and the conditions of said bond thereupon became and were broken on each and every day during said time.

VI. Plaintiff further shows, that at a meeting of the board of trustees of said village [board of commissioners of excise, or supervisor], held on the ..... day of ....., 188 , it was resolved by said board, that an action should be commenced in pursuance of section 24 of chapter 628 of the Laws of 1857, againstt the said defendants upon said bond to recover the penalty or forfeiture given upon a breach thereof, and this action is prosecuted in behalf of, and by said board for that purpose, in pursuance of their duty under the statute.

VII. That by reason of the facts hereinbefore set forth, an action has accrued to the plaintiffs upon said bond, and the defendants are indebted to the plaintiffs thereon, jointly and severally, according to the terms and conditions thereof, by reason of such breach, in the sum of $250, for which sum plaintiffs demand judgment besides costs of action.

.....

**Dis't Att'y of ..... County, Att'y for Plaintiffs.*

---

* See section 1962, Code of Civil Procedure.

[This complaint must be verified by one of the parties bringing the action.]

## No. 27.

*Complaint Under the Civil Damage Act—Section 69.*

..... COURT.

S. B.
*against*
C. D. AND E. F.

Plaintiff complains of the defendants and alleges:

I. That she is and has been, since the ..... day of ....., 188 , the wife of A. B., and has ever since her marriage to him lived with and been entirely dependant upon her said husband for her means of support, and was up to the 4th day of July, 1883, supported and provided for by him. That from the time of plaintiff's marriage up to said July fourth the said A. B. had been entirely sober and industrious; but that previous to the date of their said marriage he had been in the habit of using intoxicating liquors to excess, all of which was well known to the defendants.

II. That defendant C. D. is the keeper of a hotel in the town of ....., county of ....., called the ..... house, and has been for the last ..... months. That the same was and is leased by said C. D. of the defendant E. F., with full knowledge, on the part of said lessor, that the same was to be used and kept for a hotel in which intoxicating liquors were to be sold.

III. That on the 4th day of July, 1883, the said A. B., plaintiff's husband as aforesaid, went to defendant's said hotel and then and there commenced to drink intoxicating liquors at the bar of said C. D., which liquors were sold or given to said A. B. by said C. D., or his duly authorized agent or bar-tender. That plaintiff thereupon forbade the said C. D. to sell or give her said husband any more intoxicating liquors; but he then and thereupon insolently ordered plaintiff out of doors, and continued to sell or give to plaintiff's said husband intoxicating liquors, and especially did he give or sell to, and to be drank by him, whiskey, gin and strong beer, which caused her said husband to become intoxicated and unable to manage and control his conduct or actions, and he thereupon, on said July 4, 1883, by reason of such intoxication, wandered aimlessly out into the night and fell and lay upon the railroad track in the village of ..... and was there run over by a train of cars and his leg was broken and he was otherwise greatly injured and mangled by said cars and he became thereby totally and forever disabled, as plaintiff verily believes, for the performance of any manual labor, and upon which she is dependent for support, and plaintiff has been by reason thereof reduced to great want and destitution.

IV. That by reason of the facts aforesaid, plaintiff has been deprived entirely of her means of support, and has suffered damage in the sum of $....., for which, and for exemplary damages, she is entitled to recover of the defendants

in accordance with the provisions of chapter 646 of the Laws of 1873. Wherefore the plaintiff demands judgment against the above named defendants for the sum of $....., besides costs of action.

X. Y., *Plaintiff's Attorney.*

---

## Informations to be Presented to Magistrates Alleging the Commission of Various Misdemeanors under the Excise Laws.

### No. 28.

*For Selling to an Indian or Minor under Fourteen—Section* 26.

..... *County, ss.:*

A. B., being duly sworn, deposes and says, that he resides in ....., said county; that on the ..... day of ....., 188 , in said town, one C. D. did unlawfully and knowingly * violate section 15 of chapter 628 of the Laws of 1857, as amended by chapter 420 of the Laws of 1877 of the State of New York, and that he did on that day, personally [or by his wife, servant, etc.],† sell or give away strong and spirituous liquors, to wit: whiskey, to one E. F., an Indian, at his house or shop in the said town of ....., said county and State. [Or from the †] sell strong and spirituous liquors, to wit: brandy, to G. H., a minor under the age of fourteen years, knowing or having reason to believe such minor to be under such age.

Subscribed and sworn to before me, }
this ..... day of ....., 188 . }

.....

---

### No. 29.

*For Public Intoxication—Section* 28.

..... *County, ss.:*

A. B., being duly sworn, deposes and says, that he is a constable in and for the town of ....., said county; that on the ..... day of ....., 188 , he found C. D. intoxicated in a public street or place in said town, to wit: in the post-office in the village of ....., in said town, contrary to the provisions of section 17 of chapter 628 of the Laws of 1857, as amended by chapter 856 of the Laws of 1869.

Subscribed, etc.

---

### No. 30.

*For Selling to a Person Guilty of Habitual Drunkenness—Section* 31.

[As in form No. 28 to the *, continuing] violate section 20, chapter 628 of

the Laws of 1857, by selling strong and spirituous liquors, to wit: whiskey and beer to E. F., a person guilty of habitual drunkenness. [Or to E. F., the husband of G. F., to whom the said C. D. had been forbidden to sell intoxicating liquors, in pursuance of section 20 of chapter 628 of the Laws of 1857.]

Subscribed, etc.

---

### No. 31.

*For Selling to a Pauper or Inmate of Poor-house—Section* 31.

[As in form No. 28 to the *, continuing] violate section 20 of chapter 628 of the Laws of 1857, by knowingly selling strong and spirituous liquors, to wit: whiskey and rum to E. F., a pauper and inmate of a poor-house. That at the time of such sale the said C. D. was an inn, tavern or hotel keeper.

Subscribed, etc.

---

### No. 32.

*For Selling on Sunday or Election Day—Section* 32.

[As in form No. 28 to the *, continuing] violate section 21, chapter 628 of the Laws of 1857, as amended by chapter 549 of the Laws of 1873, by selling or giving away intoxicating liquors, to wit, whiskey and beer to E. F. and G. H., and other persons as a beverage. That said ..... day of ....., 188 , was Sunday [or was a day on which a general or special election was held, and said sale was made within one-quarter of a mile of the poll of such election].

Subscribed, etc.

---

### No. 33.

*For Adulterating or Selling Adulterated Imported Liquors—Section* 40.

[As in form No. 28 to the *, continuing] violate section 29 chapter 628 of the Laws of 1857, and that he did on that day, and on several other days during said month, adulterate imported or other intoxicating liquors with poisonous or deleterious drugs or mixtures, or sold the same, in this, to wit [here recite the facts as near as ascertainable]: or [that he knowingly imported or sold, on said day, intoxicating liquors or wines adulterated with poisonous or deleterious drugs or mixtures, to wit].

Subscribed, etc.

---

### No. 34.

*For Railroad Employee Intoxicated, etc—Section* 51.

[As in form No. 28 to the *, continuing] violate section 420 of the Penal Code of the State of New York, and that he did, while employed as engineer

[conductor, or brakeman, etc.], become and was intoxicated while engaged in the discharge of his duties as such engineer on the ..... railroad.

Subscribed, etc.

---

## No. 35.

*For Selling in a Court House—Section 54.*

[As in form No. 28 to the *, continuing] violate section 32 of the Code of Civil Procedure, and did on that day sell strong, spirituous or fermented liquors or wines, to wit, whiskey and ale, in the building established as the county court house of said county, situated in the village of ....., and while a court was sitting therein.

Subscribed, etc.

---

## No. 36.

* *Complaint to a Board of Excise of a Violation—Section 49.*

I, A. B., a resident of the town of ....., county of ....., hereby complain to you, as the board of commissioners of excise in and for the said town, and allege that C. D., a hotel keeper of said town, duly licensed to sell strong and spirituous liquors, wines, ale and beer, under and by virtue of the excise laws of this State, has violated the terms and conditions of his license by selling strong and spirituous liquors, wines, ale and beer, on Sunday, the ..... day of ..... , 188 , to E. F. and a number of other persons whose names are to me unknown [or recite any other violation], and I hereby demand that you, as such board of excise, summon said C. D. before you and inquire into the truth of such charges, according to section 8 of chapter 175 of the Laws of 1870, as amended by section 4, chapter 549 of the Laws of 1873.

A. B.

*To the Board of Commissioners of Excise of the town of ....., county of .....*

---

## No. 37.

*Affidavit under Section 57, Code of Criminal Procedure, where the Offender desires the Charge Prosecuted by Indictment.*

*County of ....., ss.:*

A. B., being duly sworn, says that he has been arrested upon a charge of violating section 13 of chapter 628 of the Laws of 1857, for selling strong and spirituous liquors in quantities less than five gallons at a time, without having a license therefor as provided by law [or any other offense under the excise

---

* It would be the safer way to have proofs accompany the above complaint, substantially like form No. 21. This would compel attention.

law] that [here state reasons for prosecution by indictment]. Deponent therefore prays that an order may issue under and in pursuance of section 57 of the Code of Criminal Procedure, allowlng the charge against deponent to be prosecuted by indictment.

Subscribed, etc.

---

## No. 38.

*Certificate under Section 57 of the Code of Criminal Procedure.*

I, ....., county judge of ..... county, do hereby certify upon proof furnished me, that it is reasonable that the charge of selling strong and spirituous liquor in quantities, etc. [using the words of the statute characterizing the offense charged], made against A. B., and who is now under arrest upon a warrant issued for an alleged commission of said offense, by ....., justice of the peace of the town of ....., in said county of ....., be prosecuted by indictment, and I hereby fix the amount in which the defendant shall give bail to appear before the grand jury at the sum of .....

C. D.,

*County Judge, or Justice of the Supreme Court.*

On filing such certificate with the magistrate, and furnishing bail in the amount stated, the defendant is entitled to be discharged.

The form of undertaking, under section 568, Code Criminal Procedure, can easily be made applicable.

There are forms applicable to several sections of the excise laws, as contained in this work, which it is not considered necessary to insert here, as they are of limited use and easily prepared from the Code of Criminal Procedure. (Banks' 2d edition.) Reference is made either to the section or the number of the form as contained in said edition of the code.

Information for disorderly house, form No. 34; warrants, sections 151 to 156; return to warrant, form No. 86; statement and questions put to defendant by justice, form No. 90; undertaking, section 568; commitment, section 214; indictment, section 276; certificate of conviction, section 721.

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